(1)
Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

YANKTON SIOUX TRIBE, and its individual members, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Petitioners,

v.

MATT GAFFEY, States Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether allotments made under the General Allotment Act, 25 U.S.C. § 331 et seq. cease to be "Indian Country" if the allotments are conveyed to non-Indians.

2. Whether the Yankton Sioux Reservation was diminished by the conveyance of individual Indian allotments to non-Indians in fee simple.

PARTIES TO PROCEEDING BELOW

Petitioner is the Yankton Sioux Tribe and its individual members. A full list of case names and parties is contained in the caption to this petition.

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PETITION FOR WRIT OF CERTIORARI

The Yankton Sioux Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

There are five reported decisions in this matter. The judgment of the Court of Appeals from which the tribe petitions for a writ of certiorari is based upon an opinion reported at 188 F.3d 1010 (August 31, 1999) hereinafter *Yankton II*, rehearing denied December 8, 1999. The District Court opinion is contained at 14 F. Supp. 2d 1135 (D.S.D. 1998).

The above opinions are from proceedings after remand from this Court, in an opinion at 522 U.S. 329, hereinafter, *Yankton I*. *Yankton I* reversed in part the Circuit Court opinion at 99 F.3d 1439 (8th Cir. 1996), vacated 141 F.3d 798 (8th Cir. 1998). The original District Court decision is reported at 890 F. Supp. 878 (D.S.D. 1995).

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. A petition for rehearing was denied on December 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the United States Constitution states in pertinent part:

> All legislative Powers herein granted shall be vested in a Congress of the United States.

U.S. Const. Art. I § 1.

The applicable portion of the General Allotment Act, codified at 25 U.S.C. § 331 states:

> In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or re-surveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the

number or acres of non-irrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him for non-irrigable agricultural or grazing lands: Provided further, That where a treaty or Act of Congress setting apart such reservation herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and non-irrigable lands established in this Act, with the consent of the Indians expressed in such manner as the President in his discretion may require.

28 Stat. 286, 314 (1894 Act) states in part:

ARTICLE I. The Yankton tribe of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said Indians as aforesaid.

ARTICLE II. In consideration for the lands ceded, sold, relinquished, and conveyed to the United States as aforesaid, the United States stipulates and agrees to pay to the said Yankton tribe of Sioux Indians the sum of six hundred thousand dollars ($600,000), as hereinbefore provided for.

18 U.S.C. § 1151(a) states:

Except as otherwise provided in §§ 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the

jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,. . . .

STATEMENT OF THE CASE

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) or *Yankton I*, this Court held that the 1894 Act of Congress (ratifying the 1892 Agreement with the Yankton Sioux Tribe for the sale of approximately 168,000 acres of surplus tribal lands) diminished the reservation by removing from the Reservation the unallotted, ceded lands which were opened for non-Indian settlement. This meant that, in 1894, the Reservation was diminished by approximately 1/3 with the remaining Reservation either held by the United States for tribal benefit, held as federal reserved land,[1] or held by the U.S. as individual trust property. In *Yankton I*, this Court did not need to determine the status of either allotted or federally reserved lands, and the Court explicitly restricted its holding to whether unallotted, ceded lands were severed from the Reservation.

On March 13, 1998, the Yankton Sioux Tribe filed a complaint for injunctive and declaratory relief in the U.S. District Court for the District of South Dakota, requesting judicial clarification that all lands within the original

[1] The "reserved lands" are those lands which were used for agency, school, and other tribal purposes. Under Article VIII of the 1892 agreement, the U.S. agreed not to sell those lands or open them for settlement. 14 F. Supp. at 1159.

boundaries of the Yankton Sioux Reservation not "ceded" by the 1894 Act of Congress constituted Indian Country, thus falling within the jurisdiction of the Yankton Sioux Tribe and the United States.[2] In response, the State erroneously argued that, in *Yankton I*, the Supreme Court determined that the Yankton Sioux Reservation had been disestablished. Federal jurisdiction over the Tribe's complaint was based upon 28 U.S.C. § 1331. That matter was consolidated with the case remanded from the Supreme Court.

Following an evidentiary hearing, and detailed review of the substantial record in this matter, the District Court held that the 53rd Congress had not disestablished the Yankton Sioux Reservation. The Court also held that all allotted lands remained part of the reservation, notwithstanding their fee status. *Yankton Sioux Tribe v. Gaffey*, 14 F. Supp. 2d 1135, 1137 (D.S.D. 1998).

The Eight Circuit Court of Appeals upheld in part, and reversed in part, the District Court decision. After applying the proper test to determine whether the Reservation was disestablished, the Circuit Court upheld the District Court ruling that, based upon the unique facts of

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[2] The primary jurisdiction at issue is the Tribe's jurisdiction over tribal member in the former allotments. Tribes have very limited jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (Tribes do not have criminal jurisdiction over non-Indians.); *Montana v. United States*, 450 U.S. 544 (1981) (Tribe's civil jurisdiction over non-members limited to issues impacting tribal welfare and self-government, unless the nonmember has entered into a consensual relation with the Tribe.)

this case, the Reservation had not been disestablished.[3] Contrary to 18 U.S.C. § 1151(a), prior Supreme Court precedent, and the District Court decision, the Circuit Court then determined that, although the Reservation was not disestablished in 1894, Congress intended that allotted lands that passed out of Indian hands subsequent to 1894 ceased to be "Indian Country" as that term is defined at 18 U.S.C. § 1151. The position adopted by the Circuit Court had not been briefed or argued by any party to the case.

DISCUSSION OF LAW

I. THE EIGHTH CIRCUIT COURT DECISION IS IN CONFLICT WITH SETTLED LAW THAT ALLOTTED LANDS RETAIN THEIR RESERVATION STATUS NOTWITHSTANDING THE ISSUANCE OF FEE PATENT.

The fundamental question in the captioned matter is whether allotted lands, which retained their reservation status after the Yankton Sioux Indian Reservation was allotted in 1894, ceased to be part of the Reservation if they were subsequently conveyed to non-Indian ownership. Although this Court has held that this issue has been "squarely put to rest" both by Supreme Court case law and federal statute, *Solem v. Bartlett*, 465 U.S. 463 (1984), the Eighth Circuit did not follow those binding authorities. The Supreme Court must grant the writ of

[3] The Tribe does not petition for review of the fact-based determination that the Reservation was not disestablished.

certiorari and again re-settle this important issue of law. Until this issue is resolved, it will arise repeatedly in litigation involving Indian Tribes throughout the continental United States, and it will return to this Court until resolved.[4]

The allotments at issue were Reservation in 1894. The Eighth Circuit Court of Appeals correctly held that the 1894 Congress diminished, but did not disestablish the Reservation. *Yankton II*, at 1028, 1030. The Court also held that in 1894 the Reservation comprised all lands within the exterior boundaries of the Reservation, except the ceded lands conveyed to the United States and opened to non-Indian settlement. *Yankton II*, at 1028, 1030. Thus, in 1894, the Reservation contained approximately 260,000 acres of allotments, *Yankton II*, at 1013, n.3, and additional land held by the United States but reserved and not open for settlement. *Yankton II*, at 1030.

Allotment of the Yankton Sioux Reservation was made under the General Allotment Act of 1887. *Yankton I*, at 1013, n.3; 14 F. Supp. 2d at 1140-41. After Congress approved the 1894 Act, many Indians received fee title patents to their allotted lands. Fee patents to those lands were issued under the General Allotment Act, as subsequently modified by the Burke Act.[5] The policies of allotment and fee patenting of land were later repudiated by

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[4] As discussed more fully below, the Circuit Court decision would substantially affect federal and tribal court jurisdiction, and would void many prior decisions of those Courts.

[5] Under these acts, fee patents could issue at the completion of the trust period, or under the inconsistently executed Burke Act, *see Felix S. Cohen's Handbook of Federal Indian Law* 136-138 (1982). Fee patents also frequently issued

administrative practice and by subsequent acts of Congress. 25 U.S.C. § 352(a) (Cancellation Act); 25 U.S.C. § 461 et seq. (Indian Reorganization Act).

Contrary to settled law regarding the effect of allotments and subsequent fee-patenting of such land, the Eighth Circuit Court of Appeals held that if a patent issued and the land "passed out of Indian hands", it ceased to be part of the Reservation. *Yankton II*, at 1028, 1030.[6] The Circuit Court held that, between 1894 and the end of fee-patenting of land in 1934, the Reservation was further diminished from 260,000 acres to approximately 36,000 acres. *Id.* at 1030. The Circuit Court decision is contrary to 100 years of Supreme Court precedent that former allotments continue to be Reservation land notwithstanding the subsequent fee-patent or conveyance of allotments to non-Indians. *Solem v. Bartlett*, 465 U.S. 463 (1984). In 1948 Congress adopted and codified these Supreme Court precedents at 18 U.S.C. § 1151(a).[7]

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upon death of the allottee. 25 U.S.C. § 373 (testate succession); 25 U.S.C. § 348 (intestate succession).

Allotments are conveyed to non-Indians by sale, through probate, or through foreclosure, including tax foreclosure. *See, e.g., Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987)

[6] Allotments for which fee patents were not issued or which were retained by Indians remain Reservation to this day under the Circuit Court decision. *Yankton II*, at 1030.

[7] As discussed more fully at page 21, the State has acknowledged that the Circuit decision was contrary to this clearly established precedent.

A. The Circuit Court decision is contrary to consistent, well-reasoned decisions of the Supreme Court on this issue of law.

The Circuit Court decision is in conflict with repeated decisions of the Supreme Court that hold that, unless a reservation is disestablished, former allotments unquestionably remain "Indian Country," whether or not they have been transferred to non-Indian ownership. *Solem v. Bartlett*, 465 U.S. 463 (1984); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Celestine*, 215 U.S. 278 (1909).

There is simply no decision from this Court or any Circuit Court, other than the Eighth Circuit decision at issue, that holds that an Indian Reservation has not been disestablished, but which then holds that the Reservation is diminished by the later conveyance to non-Indians of allotted land. That view, repeatedly rejected by the Supreme Court, represents an aberration which, unless reversed, will destabilize land tenure and jurisdiction on reservations throughout the Circuit and lead to conflicts of law elsewhere.

Yankton I is the seventh case in which the Supreme Court has ruled on whether the policy of allotment and the opening of an Indian reservation to settlement by non-Indians diminished or disestablished a reservation. *Hagen v. Utah*, 114 S.Ct. 958 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v.*

Superintendent, 368 U.S. 351 (1962).[8] In *DeCoteau*, the Sisseton/Wahpeton Tribe approved termination of its Reservation. Because the Reservation no longer existed, the allotments and fee patent lands were not part of the Reservation. In the remaining cases, when termination had not been approved by the Tribe, this Court recognized that former allotments that were on the Reservation remained part of the Reservation. Unlike *DeCoteau*, the Yankton Sioux Reservation has not been disestablished. As in all cases where the Reservation was not disestablished, the allotments are part of the Reservation.

The Court has addressed the status of former allotments in several other contexts, consistently holding that allotted lands remain part of the Reservation, notwithstanding the issuance of any patent. *Montana v. U.S.*, 450 U.S. 544 (1981) ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers."); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) (Indians living on former allotments on reservation enjoy same immunity from state tax as Indians living on trust land); *U.S. v. John*, 437 U.S. 634 (1978); *U.S. v. Nice*, 241 U.S. 591 (1916) ("The act of 1889 [applying the General Allotment Act to the

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[8] The importance of diminishment and disestablishment cases is demonstrated by the fact that the Court has heard seven of these cases. The Tribe has only found one disestablishment or diminishment case where the Court denied certiorari. *Duchesne Country v. Ute Tribe of Uintah, Ouray Reservation*, 522 U.S. 1107 (1998) (Petition for writ of certiorari brought by County.).

Rosebud Sioux Reservation] recognized the existence of the tribe, as such, and plainly disclosed that the tribal relation, although ultimately to be dissolved, was not to be disestablished by the making or taking of allotments." The federal government therefore retained jurisdiction over allotments.); *United States v. Pelican*, 232 U.S. 442 (1914) (Federal Court has jurisdiction over allotments.) Again all of these cases are contrary to the Circuit Court decision in this matter.

The consistent holdings of the Supreme Court are based upon the intent of the General Allotment Act of 1887 and the subsequent legislation designed to carry out that Act. In accordance with congressional intent of the above legislation, and acknowledgment of the federal government's continuing trust relationship with Indian Tribes, this Court has held:

> The first governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem v. Bartlett, 465 U.S. 463, 470 (1984); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), *citing United States v. Celestine*, 215 U.S. 278 (1909); *Hagen v. Utah*, 510 U.S. 399 (1994). Congress' intent to diminish a reservation must be "clear and plain." *United States v. Dion*, 476 U.S. 734 (1986).

Applying these principles, this Court has consistently interpreted the intent of Congress expressed in the General Allotment Act, and in subsequent acts like the 1894 Act at issue in the present case, to be:

> . . . to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted *and* the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115 – 117, 127 – 129, 776 – 777 (1958). (Emphasis added.)

Mattz v. Arnett, 412 U.S. 481, 496 (1973).

In *Mattz*, the issue was whether the Klamath River Reservation had been disestablished. That decision turned on the interpretation of an 1892 Act of Congress designed to carry out the General Allotment Act. The Supreme Court held the 1892 Act had to be interpreted "from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388."

Like *Mattz*, the 1894 Act at issue was adopted to carry out the General Allotment Act and, as in *Mattz*, the 1894 Act was to be interpreted in light of the purpose behind the General Allotment Act. The Supreme Court has properly interpreted the General Allotment Act consistent with the continuing federal trust responsibilities that form the basis of the federal relationship with Tribes

and Indians. It should insist that the Eighth Circuit follow this Court's rulings.

The Court below did not interpret the 1894 Act consistent with the purposes and policies of the General Allotment Act. The 1894 Congress' intent was based upon allotment and patent laws as they existed in 1894. Statutes related to patenting of allotments were subsequently changed by 34 Stat. § 325, 326 (codified at 25 U.S.C. § 391) (President is given discretion to extend the trust period of any allottee) and by the Burke Act of 1906 (codified at 25 U.S.C. § 349) (Secretary of Interior is given authority to issue fee patents before the expiration of the trust period). Many tribal allotments passed under the Burke Act and other evolving federal policies, not under the law as it existed in 1894. 14 F. Supp. 2d 1135, 1151 (D.S.D. 1998).

Inexplicably, the Circuit Court interprets the 1894 Congress' intent to be that tribal land would pass to non-Indians under subsequent, substantial, unanticipated changes to fee patent law. For example, in 1894, Congress knew that one of the major protections of Indian allotments was the twenty-five year trust period. That protection was eliminated by the subsequent changes to federal law under the Burke Act. In that Act, Congress gave the Secretary of the Interior discretion to issue fee patents prior to expiration of the twenty-five year trust period which existed in 1894. The Secretary used that discretion to issue patents to Yankton Sioux members even though the Secretary knew that most Yankton Sioux (and most other Indians) fell victim to tax sale foreclosures and land speculators. *Felix S. Cohen's Handbook of Federal Indian Law*

136-138 (1982); Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934*, 93-102 (1991).

In 1894 Congress knew that Indians were not prepared for non-Indian land tenure laws, and intended to protect the Indians from loss of the land. The history of the Burke Act demonstrates that the 1894 Congress was correct. The Burke Act was obviously a major change in policy from that intended by the 1894 Congress. Contrary to the Circuit Court decision, the 1894 Congress did not intend the wholesale loss of tribal allotments through the policies later established by the Burke Act.

While the 1894 Congress' long-term goal may have been to eventually disestablish all reservations, the General Allotment Act was only one step toward that goal. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). The Supreme Court has consistently held that the step toward termination made by the General Allotment Act was not sufficient to remove allotments from existing reservations, notwithstanding the subsequent issuance of fee patents or conveyance to non-Indians. To remove allotments from Reservations would have required further steps by Congress, and Congress took no additional steps with regard to Yankton Sioux allotments.

This Court should grant the writ of certiorari in this matter to review the Circuit Court decision which overrules this well-established line of Supreme Court cases.

B. The Circuit Court decision directly conflicts with 18 U.S.C. § 1151(a).

18 U.S.C. § 1151(a) states:

> Except as otherwise provided in §§ 1154 and 1156 of this title, the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,. . . .

The Supreme Court has noted that 18 U.S.C. § 1151 adopted and codified Supreme Court holdings which defined Indian Country. *U.S. v. John*, 437 U.S. 634, 648 (1978).[9] Since 18 U.S.C. § 1151's enactment in 1948, the Supreme Court has repeatedly cited the statute as the correct and definitive definition of Indian Country. *See, e.g., Solem*, 465 U.S. 463; *U.S. v. John*, 437 U.S. 634; *DeCoteau*, 420 U.S. 425; *Kennerly v. District Court*, 400 U.S. 423 (1971). In an unambiguous holding, this Court stated that the question of whether former allotments continued to be Reservation was:

> Squarely put to rest by congressional enactment of the currently prevailing definition of Indian Country in § 1151 to include "all land within the

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[9] Although 18 U.S.C. § 1151 defines "Indian Country" only for purposes of criminal jurisdiction, the Court applies that definition in both criminal and civil cases. *DeCoteau v. District County Court*, 420 U.S., at 427, n.2; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, at n.5 (1987).

> limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent. . . .

Seymour v. Superintendent, 368 U.S. at 357-58.

The Eighth Circuit decision is unquestionably contrary to the statute. The Circuit Court held:

> For these reasons, we hold that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands. These lands are not part of the Yankton Sioux Reservation and are no longer Indian country within the meaning of 18 U.S.C. § 1151.

188 F.3d at 1030.

In its petition for rehearing by the Eighth Circuit, the State noted this same error by the Circuit Court panel. The State wrote:

> were the allotments on the former Yankton reservation deemed reservation under 18 U.S.C. § 1151(a) they would not lose Indian Country status when the Indian title was extinguished. This, however, is flatly inconsistent with the body of the Panel Opinion which held that the reservation was diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands.

State Petition for En Banc Review, at 13.

As the Court clearly stated in *Seymour*, prior to the Eighth Circuit decision, the statute was the settled, relied upon, and clear definition of Indian Country throughout the United States. The Supreme Court should grant the

writ of certiorari to review the Eighth Circuit change to this well-settled law.

II. CORRECTION OF THE CIRCUIT COURT ERROR IS OF EXCEPTIONAL IMPORTANCE TO INDIAN TRIBES AND PEOPLE LIVING ON FORMER ALLOTMENTS THROUGHOUT THE UNITED STATES.

A. The Circuit decision will lead to sizable divestiture of land from Indian Tribes within the 48 contiguous states.

Adopting a view consistently rejected by the Supreme Court, the Circuit Court found that Congress intended lands which passed under to non-Indians under the General Allotment Act would cease to be Reservation land. Unless reversed, the Circuit Court view will disrupt tribal relations with the United States and cause great destruction to the very fabric of tribal government and institutions. Land on 118 reservations passed to non-Indian ownership under the General Allotment Act. Richard B. Morris, *Encyclopedia of American History* 644 (6th ed. 1982). The amount of land allotted to Indians and subsequently conveyed to non-Indians was 27,000,000 acres. *Felix S. Cohen's Handbook of Federal Indian Law* 138 (1982).[10]

The novel and far-reaching Circuit Court decision should only have been reached upon a careful consideration and analysis of Supreme Court precedents. Instead

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[10] 27,000,000 acres is approximately the size of the state of Ohio. There are 16 states which are less than 27,000,000 acres.

the Circuit Court made its sweeping change to the law in a cursory manner, in a single sentence of the Court's twenty page opinion, where the Court states:

> When viewed in its full historical context, however, it is clear that the parties did not intend for the tribe to retain control over allotted lands which passed out of trust status and into non-Indian hands. (Footnotes and citations *not* omitted.)

188 F.3d at 1030.

By threatening to disturb the status of the law that for years has maintained a semblance of jurisdictional stability in Indian Country, the Circuit Court ruling in this case will substantially harm the Yankton Sioux Tribe and other Indian Tribes and reservations throughout the Nation. Both Indian tribes and non-Indian communities that previously relied upon 18 U.S.C. § 1151(a) and the long line of United States Supreme Court cases in this area of the law will be thrown into jurisdictional limbo and chaos.

B. Removal of allotments from Reservations will upset the finality of innumerable federal and tribal court decisions.

The jurisdictional uncertainty created by the Circuit Court decision affects far more than just land: it affects the validity of decisions of tribal and federal courts. Tribal Courts exercise jurisdiction over "Indian Country" as that term is defined by federal law. The Circuit Court's radical redefinition of "Indian Country" will void innumerable tribal court decisions. There are over 250 tribal

courts in the United States. Joseph A. Myers & Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future*, 79 Judicature 147, 149, Nov.-Dec. 1995. Caseload in these courts varies, depending on the size and population of the reservation. For example, the Navajo Court handles approximately 25,000 cases per year, while the Gila River Reservation handles 3,200 cases per year. J. Clifford Wallace, *A New Era of Federal-Tribal Court Cooperation*, 79 Judicature 150, 152, Nov.-Dec. 1995.

Based upon the heretofore settled law, these tribal courts have long exercised jurisdiction over Indians on former allotments. Tribal Courts hear criminal trials, termination of parental rights, adoptions, child custody and support, dissolution of marriage, probate, tort cases, employment appeals, and general civil cases. Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 American Indian Law Review, 285, 1998. Tribal court orders are frequently afforded recognition by other courts under principles of comity and federal law.

The Circuit Court casts intolerable uncertainty over tribal and federal court decisions that arose on former allotments. For example, the decision is precedent to void long-settled tribal court adoptions. The decision will create disorder related to tribal court orders of dissolution of marriages, and acts in reliance thereon. After a dissolution, a party is free to remarry, and the dissolution affects the interpretation of wills and alters intestate succession. People, especially tribal people, rely upon these and other decisions of tribal courts. The Yankton Sioux Tribe asks the Court to review the Eighth Circuit Court decision and to restore certainty to the status of former allotments and certainty to the jurisdiction of tribal courts.

III. THE EIGHT CIRCUIT OPINION IS IN DIRECT CONFLICT WITH A DECISION OF THE TENTH CIRCUIT COURT OF APPEALS.

The opinion in the instant case is in direct conflict with the Tenth Circuit Court of Appeals on an important issue of law.[11] *See Ute Indian Tribe of the Unitah and Ouray Reservation v. State of Utah*, 114 F.3d 1513 (10th Cir. 1997).

In *Ute*, as in the present case, the Circuit Court was required to apply Supreme Court precedent to determine the status of former allotments, where the Reservation had been diminished by the sale of "surplus" property scattered throughout the Reservation. Contrary to the Eighth Circuit decision in the present case, the Tenth Circuit held that the former allotments remain part of the Reservation.

In the 1980's, the Ute Indian Tribe brought an action for injunction and declaratory judgment against the State of Utah, joining also Duchesne Country, Uintah County and Roosevelt City as defendants. The Federal District Court for Utah held that the Uncompahgre Reservation had been disestablished, but that the Uintah and Ouray Reservation had not been disestablished, except as to

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[11] For some areas of law, the Court might be inclined to wait until more of the thirteen Circuit Courts reach an issue. Because the captioned matter relates to diminishment of reservations, which are concentrated in the western United States, the Eighth and Tenth Circuits are two of the three Circuits where the issue is likely to arise. A disagreement between these two circuits on an issue of this importance to Indian law must be resolved.

lands that had been specifically removed from the Reservation for other purposes. *Ute Indian Tribe v. State of Utah, et al.*, 521 F. Supp. 1072 (D. Utah 1981), *aff'd. en banc*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986). After extended litigation, a separate case dealing with the status of the Ute Reservation ended up in the Supreme Court. *Hagen v. Utah*, 510 U.S. 399 (1994).

In *Hagen*, Justice O'Connor, writing for the Court, ruled that the Uintah Valley Reservation was diminished, but not disestablished or terminated. Following the *Hagen* decision, the State of Utah and other local parties began pushing their case back through the federal courts, ultimately asking the Tenth Circuit Court to withdraw completely its earlier mandate which held, as did this Court in *Yankton I*, that the Reservation was neither diminished nor disestablished. In response to that request, and in view of the *Hagen* decision the Tenth Circuit, held:

> To the extent that the boundary determinations made in the *Ute Indian Tribe III* (in which the Tenth Circuit ruled *en banc* that the Reservation boundaries were neither diminished nor disestablished) do not directly conflict with *Hagen*, they remain in effect.

Ute Indian Tribe of the Unitah and Ouray Reservation v. State of Utah, 114 F.3d 1513, 1528 (10th Cir. 1997).

> Moreover, the diminishment was only with respect to those lands which had been restored to the public domain under the 1902-1905 legislation. (Citations omitted) . . . In sum *Hagen* does not conflict with our holding in *Ute Indian Tribe III* that these categories of non-trust lands

> remain within Indian Country under section 1151(a).

Ute Indian Tribe, at 1530.

If the Yankton Sioux Reservation were located within the Tenth Circuit, it would consist of 260,000 acres, instead of the 36,000 acre Reservation as held by the Eighth Circuit Court of Appeals. The Tribe respectfully requests that the Court resolve this conflict between Circuit Court decisions.

CONCLUSION

The Yankton Sioux Tribe respectfully requests that the Court grant the writ of certiorari. The sweeping, unprecedented change in federal Indian law made by the Eighth Circuit should command the full attention of the Court. This Court should intervene to prevent the foreseeable legal chaos which will result from the Circuit Court's unprecedented decision.

Respectfully submitted,

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Nos. 99-1490 and 99-1683

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE, ET AL.

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

v.

MATT GAFFEY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Yankton Sioux Reservation, which this Court held in *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), had been diminished to the extent of those lands that had been ceded to the United States for sale to non-Indian settlers, has been wholly disestablished.

2. Whether the Yankton Sioux Reservation has been further diminished to the extent of those allotted lands that have passed out of Indian ownership.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (State Pet. App. 1-49) is reported at 188 F.3d 1010.[1] The opinion of the district court (State Pet. App. 50-113) is reported at 14 F. Supp. 2d 1135.

[1] References to "State Pet. App." are to the Appendix in No. 99-1490 filed by the State of South Dakota.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. The petitions for rehearing were denied on December 8, 1999 (State Pet. App. 114). The State's petition for a writ of certiorari was filed on March 8, 2000. The Tribe's petition for a writ of certiorari was filed on March 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Treaty of April 19, 1858, 11 Stat. 743 (State Pet. App. 115-126), the Yankton Sioux Tribe ceded to the United States its aboriginal lands, comprising about 13 million acres, except for a 430,000-acre Reservation in what is now Charles Mix County in southeastern South Dakota. State Pet. App. 8, 54-55. Subsequently, the United States made allotments of reservation lands to the individual members of the Yankton Sioux Tribe, pursuant to the General Allotment Act, ch. 119, 24 Stat. 388, and the Act of February 28, 1891, ch. 383, 26 Stat. 794. Ultimately, more than 262,000 acres were allotted. State Pet. App. 8 & n.3, 64.

In 1892, Congress directed the Secretary of the Interior to negotiate with the Yankton Sioux for the sale of surplus reservation lands that were not needed for allotments. Act of July 13, 1892, ch. 164, 27 Stat. 137. In December 1892, the tribal leaders signed an agreement (the 1892 Agreement), later adopted by a majority of the Tribe, in which they agreed to "cede, sell, relinquish, and convey" all of their interest in the unallotted lands within the Reservation for $600,000. State Pet. App. 128-129. The unallotted ceded lands totaled approximately 168,000 acres. *Id.* at 64. In 1894, Congress "accepted, ratified, and confirmed" the 1892 Agreement. Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (1894 Act) (State Pet. App. 127-140).

2. In *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the 1894 Act diminished the Yankton Sioux Reservation by severing the unallotted ceded lands from the Reservation. In reaching that result, the Court principally relied upon the "'cession' and 'sum certain'" language in the 1894 Act by which the Tribe ceded all of its interest in the unallotted lands for a sum certain. *Id.* at 344. The Court had previously held that such language creates an "almost insurmountable" presumption of diminishment. *Ibid.*; see *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).[2]

The parcel of land at issue in *Yankton Sioux Tribe* was unallotted land ceded to the United States by the 1894 Act. The Court therefore found it unnecessary to decide whether the Yankton Sioux Reservation had been wholly disestablished. The Court explained that "[t]he conflicting understandings about the status of the reservation, together with the fact that the Tribe continues to own land in common, caution us * * * to limit our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation." 522 U.S. at 358.

3. On remand, the district court consolidated the original action, *Yankton Sioux Tribe* v. *Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe* v. *Gaffey* (No. 98-4042). In the new action, the Tribe sought declaratory and injunctive

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[2] The Court concluded that "the contemporary historical context," while supporting its conclusion that Congress intended to diminish the Reservation, was "not so compelling that, standing alone, it would indicate diminishment." 522 U.S. at 351. The Court further concluded that the subsequent conduct of the United States, the State, and the Tribe "reveals no consistent, or even dominant, approach to the territory in question," and therefore "carries but little force in light of the strong textual and contemporaneous evidence of diminishment." *Id.* at 356 (internal quotation marks omitted).

relief precluding the State and Charles Mix County from exercising criminal jurisdiction over tribal members on (i) any lands that had been allotted to members of the Tribe, whether or not those lands are now held in trust by the United States for the Tribe or individual Indians, and (ii) those ceded lands that had been reserved from sale to non-Indians under the 1894 Act for Indian agency, school, and other purposes, but that are now held in trust by the United States for the Tribe. The United States, which had previously participated in No. 94-4217 as an amicus curiae, intervened in the consolidated action. State Pet. App. 6-7.

The district court, after taking additional evidence, held that Congress had not disestablished the Yankton Sioux Reservation. State Pet. App. 53. Instead, the court concluded that the 1894 Act had "modified or reconceptualized" the Reservation to consist of all of the lands within its original exterior boundaries that had not been ceded to the United States for sale to non-Indian settlers; accordingly, the Reservation continued to consist of "all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes." *Ibid.* The court based that conclusion on the text of the 1894 Act and the 1892 Agreement, the record of the negotiations between the United States Commissioners and the Yankton Sioux, the materials submitted to Congress in connection with passage of the 1894 Act, and the subsequent treatment of the allotted lands by the United States, the State, and the Tribe. *Id.* at 67-109.

As a consequence of the district court's decision, the original Reservation, which comprised some 430,495 acres, would be reduced to approximately 262,000 acres. State Pet. App. 64. The district court recognized that its decision would create "a checkerboard pattern of jurisdiction," because the Indian allotments were spread throughout the

original Reservation. *Id.* at 109. The court noted that a similar jurisdictional pattern had been approved in *Ute Indian Tribe* v. *Utah*, 114 F.3d 1513 (10th Cir. 1997), cert. denied, 522 U.S. 1107 (1998).

4. The court of appeals affirmed in part and reversed in part. State Pet. App. 1-49. The court agreed with the district court that the Yankton Sioux Reservation had not been disestablished. But the court held that the Reservation had been further diminished to exclude not only the unallotted ceded lands that were the subject of this Court's decision in *Yankton Sioux Tribe* but also those allotted lands that passed out of trust status and are now owned by non-Indians.

a. At the outset, the court of appeals recited the well-settled principles governing the analysis of diminishment and disestablishment questions. First, the court noted that "[c]ongressional intent is the touchstone" for determining whether a reservation has been diminished or disestablished, and thus that land set aside for a reservation retains that status until Congress indicates otherwise. State Pet. App. 26 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977), and *Solem*, 465 U.S. at 470). Second, the court noted that Congress's "[i]ntent to diminish or disestablish a reservation must be 'clear and plain'" from the text of the statute, the legislative history, or the surrounding circumstances. *Ibid.* (quoting *United States* v. *Dion*, 476 U.S. 734, 738 (1986)). Third, the court noted that "neither diminishment nor disestablishment will be found lightly," and that any ambiguities in statutes or agreements bearing on the question are resolved in favor of the Indians. *Id.* at 30 (citing *Yankton Sioux Tribe*, 522 U.S. at 344; *Hagen*, 510 U.S. at 411). Finally, the court noted that each statute that is claimed to disestablish or diminish a reservation "must be analyzed individually, its effect depending on the language

used and the circumstances of its passage." *Id.* at 29 (citing *Solem*, 465 U.S. at 469).

b. The court of appeals held that no sufficiently clear expression of Congress's intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the incorporated 1892 Agreement, in the record of the negotiations between the United States and the Yankton Sioux, or in the other materials before Congress at the time of the adoption of the 1894 Act. State Pet. App. 30-41,

The court of appeals observed that Articles I and II of the 1894 Act—the provisions principally relied on by this Court in *Yankton Sioux Tribe*—"refer[] explicitly only to the ceded lands." State Pet. App. 30. The court determined that three other articles of the 1894 Act contemplated some degree of continuing tribal governance over the allotted lands. The court perceived that Article V, which provided for a $50,000 fund that could be used, among other things, for schools, courts, and "other local institutions for the benefit of said tribe," "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux." *Id.* at 39. The court viewed Article XVII, which prohibited the sale of liquor "upon any of the lands by this agreement ceded and sold to the United States" and "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians," as "acknowledg[ing] the continued existence of two distinct categories of land to which different laws might apply." *Id.* at 39-40. And the court read Article VIII, which reserved from sale to settlers those ceded lands "as may now be occupied by the United States for agency, schools, and other purposes," as indicating that "some lands were expected to remain outside of primary state jurisdiction." *Id.* at 40.

The court of appeals likewise found no clear indication of an intent to diminish the Yankton Sioux Reservation in the record of the negotiations between the United States and

the Tribe. State Pet. App. 32-36. The court observed that the United States Commissioners who negotiated the 1892 Agreement had "repeatedly emphasized" to the Tribe that "their primary objective was the purchase of the *unallotted* lands." *Id.* at 33. The court noted that the Commissioners had also "indicated that the tribal leadership would retain some governing powers"; for example, the Commissioners had suggested that the Tribe, after selling its surplus lands, might be able to have the Reservation organized as a separate county, in which the Tribe could govern its own members so long as they obeyed the laws of the State. *Id.* at 34. The court viewed such statements as "suggest[ing] the parties did not intend to disestablish the reservation." *Ibid.* The court further observed that the Commissioners' subsequent report to Congress did not equate the Tribe's sale of the surplus lands with the Tribe's immediate loss of sovereignty over the unceded lands. *Id.* at 36-37. The report instead reflected what the court described as the parties' understanding that "only a portion of the reservation was being separated at that time." *Id.* at 37.

c. The court of appeals nonetheless concluded that Congress intended to diminish the Reservation not only by the land ceded in 1894, but also by any lands that would later pass into the hands of non-Indian settlers. State Pet. App. 43. Accordingly, the court "h[e]ld that the Yankton Sioux Reservation has not been disestablished, but that it has been further diminished by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *Id.* at 47. The court did not point to any express statement in the 1894 Act, the 1892 Agreement, the negotiation records, or the legislative history to support that conclusion. Instead, the court reasoned that the 1894 Act, when "read in its full historical context," contemplated that tribal members would eventually obtain fee title to their allotted lands, gain the ability to sell those lands to non-Indians, and

become subject to the civil and criminal laws of the State. *Id.* at 43. The court also observed that "nothing in [the] text [of the 1894 Act] or the circumstances surrounding its passage suggests that any party anticipated that the Tribe would exercise jurisdiction over non[-]Indians who purchased land after it lost its trust status." *Id.* at 42. The court found additional support for its conclusion in the absence of any evidence that the United States or the Tribe had asserted jurisdiction until the 1990s over formerly allotted lands that were no longer held in trust. *Id.* at 45-46.

The court of appeals did not determine precisely which lands, after excluding the ceded lands and the allotted lands owned by non-Indians, remain within the surviving Yankton Sioux Reservation. The court concluded only that "the land reserved to the federal government in the 1894 Act and then returned to the Tribe" retains its reservation status. State Pet. App. 48. The court remanded the case to the district court for a complete determination of which other lands remain a part of the Reservation. *Ibid.*

ARGUMENT

The court of appeals erred in holding that the Yankton Sioux Reservation has been progressively diminished as formerly allotted lands have passed into non-Indian hands. Nevertheless, the court's decision does not warrant this Court's review, at least not at this interlocutory stage of the case. The court purported simply to apply, to the particular circumstances of this case, the rules of law previously announced by this Court in earlier disestablishment and diminishment cases. The court's decision does not squarely conflict with any decision of this Court or any other court of appeals. Nor, contrary to the State's suggestion, does the decision conflict with the South Dakota Supreme Court's decision in *Bruguier* v. *Class*, 599 N.W.2d 364 (1999). Indeed, the actual holding in *Bruguier*—that allotted lands

within the original Yankton Sioux Reservation that are now owned by non-Indians are not Indian country under 18 U.S.C. 1151—is fully consistent with the actual holding in this case. Neither the Eighth Circuit nor the South Dakota Supreme Court reached any definitive conclusion as to precisely which other lands within the original Reservation retain their status as Indian country. No such lands were at issue in *Bruguier*, and, here, the court of appeals remanded the case for further proceedings on that question. If a conflict should develop between the Eighth Circuit and the South Dakota Supreme Court concerning the Indian country status of particular lands within the original Reservation, or if the Eighth Circuit's decision concerning the progressive diminishment of this particular Reservation should prove to have consequences for other Reservations, there will be time enough for this Court to grant review at a later date.

A. The Court Of Appeals' Holding That The Yankton Sioux Reservation Has Not Been Disestablished Does Not Merit This Court's Review

1. In concluding that the Yankton Sioux Reservation has not been wholly disestablished, the court of appeals applied the standards repeatedly articulated by this Court, see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998), to the particular facts and circumstances of this case. Such a fact-specific application of settled legal standards does not ordinarily merit this Court's review. See Sup. Ct. R. 10.

As the court of appeals recognized (State Pet. App. 26, 29-30), Congress's intent to diminish or disestablish a reservation must be "clear and plain," as reflected in the text of the surplus land Act, the legislative history, and the surrounding circumstances. *Yankton Sioux Tribe*, 522 U.S. at 343-344 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986)); *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem* v.

Bartlett, 465 U.S. 469, 470-471 (1984).[3] There is no expression of congressional intent, much less the "clear and plain" expression required by this Court, to disestablish the Yankton Sioux Reservation.

The primary purpose of the 1894 Act was to transfer unallotted surplus lands from the Yankton Sioux Tribe to the United States. That transfer was accomplished by Articles I and II of the 1894 Act—the provisions that this Court principally relied upon in *Yankton Sioux Tribe*—which provided for the cession of the surplus lands and established the amount of payment for those lands. See 522 U.S. at 344-345. Those articles refer only to the unallotted surplus lands, not to the lands that were to be allotted to tribal members.

No other provision of the 1894 Act offers any clear indication that Congress intended that the cession of the unallotted lands would result in the disestablishment of the entire Reservation. Indeed, several provisions of the 1894 Act and the incorporated 1892 Agreement point to the opposite conclusion.

Article VIII of the 1894 Act reserved from sale to non-Indian settlers those lands ceded by the Tribe to the United States "as may now be occupied by the United States for agency, schools, and other purposes." 28 Stat. 316 (State Pet. App. 132). This Court recognized in *Yankton Sioux Tribe* that Article VIII "counsels against finding the reservation terminated," because Congress probably would not have reserved lands for such purposes if it had not anticipated a continuing Reservation. 522 U.S. at 350; accord *Solem*, 465 U.S. at 474. The court of appeals similarly viewed Article VIII as reflecting "Congress' expectation that the

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[3] The Court has also stated that the inquiry into disestablishment or diminishment may, "to a lesser extent," be informed by "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S. at 344 (quoting *Hagen*, 510 U.S. at 411).

federal government would continue to have a significant presence in the area for the welfare of the Tribe," so that "some lands were expected to remain outside of primary state jurisdiction." State Pet. App. 40.

Article XVII of the 1894 Act prohibited the sale or offering of intoxicating liquors "upon any of the lands by this agreement ceded and sold to the United States" *and* "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty." 28 Stat. 318 (State Pet. App. 136). As this Court observed in *Yankton Sioux Tribe*, Article XVII "thus signal[s] a jurisdictional distinction between reservation and ceded land." 522 U.S. at 350; see State Pet. App. 40 (observing that Article XVII "acknowledged the continued existence of two distinct categories of land to which different laws might apply").

Article V of the 1894 Act provided a mechanism for funding, from interest due the Tribe on proceeds from the sale of ceded lands, various post-cession tribal activities, such as the care of "orphans, and aged, infirm, or other helpless persons of the Yankton tribe," schools and educational programs, and "courts of justice and other local institutions for the benefit of said tribe." 28 Stat. 315 (State Pet. App. 130). Article XI provided an additional source of funding of those activities from the sale of lands of tribal members who died intestate. 28 Stat. 317 (State Pet. App. 133-134). The court of appeals recognized that those provisions, which "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux," militate against a determination that Congress intended to disestablish the Reservation. State Pet. App. 39.[4]

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[4] As the court of appeals noted (State Pet. App. 39), the fund referred to in Articles V and XI was never actually established.

The record of the negotiations of the 1892 Agreement between the United States Commissioners and the Yankton Sioux likewise provides no indication of an intent to disestablish the Reservation. The Commissioners repeatedly informed the Tribe during the negotiations that they had one primary purpose—to purchase the Tribe's unallotted surplus lands. State Pet. App. 33-34 (citing S. Exec. Doc. No. 27, 53d Cong., 2d Sess. 48 (1874)). That purpose was consistent with the continued existence of a Reservation consisting of the allotted lands. The Commissioners also indicated that the Tribe would retain some governing powers after the cession, suggesting to the tribal members, for example, that "after you sold your lands, you could have this reservation organized as a separate county," and thus "you could govern your own people in your own way, so long as you obeyed the laws of the State." *Id.* at 34 (quoting S. Exec. Doc. No. 27, *supra*, at 48). The court of appeals observed that the Yankton Sioux could have interpreted such statements to mean that the cession would not alter the Tribe's control over lands retained by the Indians. The court viewed such statements, which it characterized as "references to a continuing tribal government," as suggesting that "the parties did not intend to disestablish the reservation." *Ibid.*

The negotiation records were submitted to Congress by the Secretary of the Interior to support the ratification of the 1892 Agreement. State Pet. App. 33. The congressional debates on the ratification did not address the status of the allotted lands within the Yankton Sioux Reservation. See, *e.g.*, 26 Cong. Rec. 6426 (1894) (statement of Rep. Pickler of South Dakota) ("We simply provide in this bill how these 168,000 acres of land acquired from the Indians shall be disposed of."); cf. *Yankton Sioux Tribe*, 522 U.S. at 353 (observing that "[t]he legislative history itself adds little" even with respect to the status of the ceded lands).

In sum, the court of appeals correctly concluded that no clear indication of congressional intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the 1892 Agreement, in the legislative history, or in the surrounding circumstances. State Pet. App. 41. No reason exists for this Court to revisit that conclusion.[5]

2. The State contends (Pet. 11-20) that the court of appeals' decision conflicts with the South Dakota Supreme Court's recent decision in *Bruguier* (State Pet. App. 141-172), and with this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). The State is mistaken.

a. Contrary to the State's assertion of a conflict between the decision below and the South Dakota Supreme Court's decision in *Bruguier*, the actual holdings of the two cases are identical—*i.e.*, that allotted lands within the exterior boundaries of the original Yankton Sioux Reservation that are now owned by non-Indians do not constitute "Indian country" under 18 U.S.C. 1151, and consequently that the State, not the United States and the Tribe, has primary jurisdiction over crimes committed on those lands.

Section 1151 identifies three categories of land that qualify as Indian country: reservations (18 U.S.C. 1151(a)), dependent Indian communities (18 U.S.C. 1151(b)), and allotments that remain in trust or restricted status (18 U.S.C. 1151(c)). The question whether territorial jurisdiction rests with the United States and the Tribe, on the one hand, or the State, on the other, turns on whether the land in question is Indian country, not on the particular category of Indian country into which the land is classified. See, *e.g.*, *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S.

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[5] As discussed below (pp. 21-27, *infra*), although the court of appeals did err in concluding that the Reservation was further diminished to the extent of allotted lands that have passed out of Indian hands, that aspect of the court's decision likewise does not merit review.

520, 526-527 & n.1 (1998). That is expressly so under 18 U.S.C. 1151-1153 with respect to criminal jurisdiction, the principal subject of concern in this case and *Bruguier*. And the definition of Indian country in 18 U.S.C. 1151 "generally applies to questions of civil jurisdiction" as well. *Native Village of Venetie*, 522 U.S. at 527; *DeCoteau*, 420 U.S. at 427 n.2.[6]

In *Bruguier*, the defendant was convicted of a state criminal offense for committing a burglary in Pickstown, South Dakota, which is within the exterior boundaries of the original Yankton Sioux Reservation. He subsequently sought habeas corpus relief, claiming that the offense occurred in Indian country, and thus that the State lacked jurisdiction over him. The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished. State Pet. App. 142-143. In denying habeas relief, the South Dakota Supreme Court reasoned that the 1894 Act disestablished the Yankton Sioux Reservation. But the court's actual holding was limited to the narrower issue presented in the case: whether the land on which the offense was committed constituted Indian country, and thus whether primary jurisdiction over the defendant's crime rested with the United States and the Tribe or, alternatively, with the State. The court acknowledged the limited scope of its holding, stating at the outset of its opinion: "Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership." *Id.* at 142.

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[6] For example, the same general principles of immunity from state taxation apply on any land that constitutes Indian country, whether the land is a formal reservation, see *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973); is held in trust for a Tribe but is not part of a formally designated reservation, see *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); or is an allotment still held in trust or restricted status, see *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993).

The court then concluded that allotted lands that now are owned by non-Indians do not constitute Indian country. *Ibid.*[7]

The court of appeals in this case likewise held that formerly allotted lands that now are owned by non-Indians "are not part of the Yankton Sioux Reservation and are no longer Indian country." State Pet. App. 47. Accordingly, under the holdings of both the South Dakota Supreme Court and the Eighth Circuit, the State had primary jurisdiction over the offense at issue in *Bruguier* and indeed over offenses on *all* allotted lands that have passed out of trust status and are now in non-Indian ownership. Thus, as to those lands, which total approximately 222,000 of the 262,000 acres of allotted lands on the Reservation (see State Pet. 5), the Eighth Circuit and the South Dakota Supreme Court agree that the lands are *not* Indian country.

Nor is any disagreement evident between the Eighth Circuit and the South Dakota Supreme Court with respect to the Indian country status of other lands within the original exterior boundaries of the Yankton Sioux Reservation. The South Dakota Supreme Court in *Bruguier*, for example, recognized that lands that are held in trust by the United States for the Tribe or its individual members are Indian country. See State Pet. App. 153, 155, 167, 171-172. The Eighth Circuit, while remanding for a determination of which trust lands remain part of the diminished Reservation, did not dispute that all such lands are Indian country. It is

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[7] No question was presented in *Bruguier* as to whether the land at issue was a "dependent Indian communit[y]" under 18 U.S.C. 1151(b), and the parties stipulated that the land was not an "Indian allotment[], the Indian title[] to which ha[d] not been extinguished," under 18 U.S.C. 1151(c). See State Pet. App. 142-143, 153-154. Nor was the court of appeals in this case presented with any question as to whether any lands within the original Yankton Sioux Reservation constitute dependent Indian communities.

irrelevant *why* lands held in trust by the United States for the Tribe or its individual members are Indian country—*i.e.*, whether, as the South Dakota Supreme Court appeared to believe, the lands taken into trust for the Tribe since 1894 are Indian country because they are "informal" reservations under 18 U.S.C. 1151(a), see *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), and the allotments held in trust for individual Indians are Indian country under 18 U.S.C. 1151(c), or whether, as the Eighth Circuit appeared to believe, the tribal trust lands and the allotments that remain in trust status are Indian country because they are the remnants of a "formal" (*i.e.*, the original) reservation. The essential point at this stage is that both courts agree that the allotted lands that have passed out of trust status and are now in non-Indian ownership *are not* Indian country, while both courts have indicated (but not yet definitively held) that all lands held in trust for the Tribe or individual Indians members within the boundaries of the original Reservation *are* Indian country.[8]

The decision of the court of appeals in this case thus does not present a true conflict—*i.e.*, a "conflict[] with a *decision* by a state court of last resort," Sup. Ct. R. 10(a) (emphasis added)—of the sort that warrants this Court's review. This Court reviews "judgment[s], decree[s], or order[s]" of lower courts, not the reasoning upon which such judgments, decrees, or orders are based. 28 U.S.C. 2106.

b. The court of appeals' decision also does not conflict with this Court's decision in *DeCoteau*, which held that another South Dakota Reservation, the Lake Traverse

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[8] The resulting jurisdictional pattern—with federal and tribal jurisdiction over individual allotments and parcels of tribal trust land—is essentially the same as that involved in a number of this Court's decisions, including *DeCoteau*, *Citizen Band Potawatomi Tribe*, and *Sac & Fox Nation*.

Reservation of the Sisseton-Wahpeton Tribe, had been disestablished.

This Court has cautioned against automatically extending a decision holding that one reservation was disestablished or diminished to another reservation, explaining that the "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (rejecting, as contrary to "basic principles of treaty construction," the argument that "similar language in two Treaties involving different parties has precisely the same meaning," because "the historical record" and "the context of the treaty negotiations" must be examined "to discern what the parties intended by their choice of words"). Here, the text of the surplus land Act and the circumstances surrounding its enactment differ, in several significant respects, from those in *DeCoteau*.

As for the statutory language, although both surplus land Acts provide for a cession of surplus lands for a sum certain, the 1894 Act concerning the Yankton Sioux Reservation contains provisions that do not have counterparts in the Act of March 3, 1891, ch. 543, 26 Stat. 989 (1891 Act), that ratified the agreement with the Sisseton-Wahpeton Tribe. The 1891 Act did not have a provision analogous to Article VIII of the 1894 Act, which reserved from sale to settlers those surplus lands occupied by the United States for Indian agency, school, and other purposes. 28 Stat. 316; see *Yankton Sioux Tribe*, 522 U.S. at 350 (stating that such a provision counsels against finding the Reservation disestablished). The 1891 Act also did not have a provision analogous to Article XVII of the 1894 Act, which expressly prohibited the sale of liquor on both the newly ceded lands and on "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28

Stat. 318; see *Yankton Sioux Tribe* (suggesting that such a provision draws a "jurisdictional distinction" between ceded lands and reservation lands). Nor did the 1891 Act have provisions analogous to Articles V and XI of the 1894 Act, which provided a mechanism to fund schools, courts, and "other local institutions for the benefit of [the] tribe." 28 Stat. 315, 317. Accordingly, the 1894 Act, in contrast to the 1891 Act, contemplated a continuing role for the United States and the Tribe in the area and a jurisdictional distinction between ceded and other reservation lands.

As for the surrounding circumstances, the Sisseton-Wahpeton expressed their understanding, with a clarity that the Yankton Sioux did not, that the cession of their surplus lands and the allotment of their remaining lands would terminate the Reservation. For example, the Court noted that spokesmen for the Sisseton-Wahpeton Tribe had stated that "[w]e never thought to keep this reservation for our lifetime," 420 U.S. at 433; that "[w]e don't expect to keep [the] reservation," *ibid.*; and that "[t]his little reservation * * * was given us as a permanent home, but now we have decided to sell," *id.* at 436-437 n.17. As the court of appeals observed, "[t]he background of the Lake Traverse agreement was very different from that of the 1894 Act, * * * because the tribal members there had expressed their clear desire to terminate their reservation." State Pet. App. 23.

Finally, the Sisseton-Wahpeton Tribe negotiated for substantially more allotted acreage per capita than was provided by the General Allotment Act or was received by the Yankton Sioux under the 1894 Act. The General Allotment Act, pursuant to which the allotments to the Yankton Sioux were made, provided that heads of household were to receive 160 acres, single persons over 18 or orphans were to receive 80 acres, and other persons were to receive 40 acres. State Pet. App. 61. In contrast, each Sisseton-Wahpeton *member*, "regardless of age or sex," received a 160-acre

allotment. *DeCoteau*, 420 U.S. at 435; see also *id.* at 438 n.19 (quoting the Senate Committee Report on the Sisseton-Wahpeton agreement as explaining that "the departure from the general allotment act of 1887 in the case of these Indians is just and proper," principally because "the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families"). The court of appeals thus recognized that the agreement in *DeCoteau* differed from the agreement here, because the Sisseton-Wahpeton, "in exchange" for the termination of their Reservation, "negotiated allotments for each individual, including married women." State Pet. App. 23. The Yankton Sioux did not.

In sum, given the significant differences in the language of the surplus land Acts involving the Yankton Sioux Reservation and the Lake Traverse Reservation as well as in the circumstances surrounding their enactment, no conflict exists between the decision below and this Court's decision in *DeCoteau*.

3. The State finally asserts (Pet. 20-26) that the court of appeals erroneously concluded that three types of trust land "retained, or may have retained, reservation status": (i) the so-called "agency lands," which were ceded to the United States under the 1894 Act but reserved for Indian "agency, schools, or other purposes," were later returned to the Tribe, and are now held in trust by the United States for the benefit of the Tribe; (ii) any allotted lands that remain in trust; and (iii) any lands acquired by the United States since 1934 and held in trust for the Tribe or individual Indians pursuant to 25 U.S.C. 465. No issue concerning the status of such lands warrants the Court's review at this time. Indeed, the court of appeals explicitly deferred any determination with respect to the status of two of the three categories of trust lands identified by the State. State Pet. App. 48.

The court of appeals made only one definitive ruling with respect to trust lands: that "the land reserved to the federal government in the 1894 Act and then returned to the Tribe continues to be a reservation under [18 U.S.C.] 1151(a)." State Pet. App. 48. The court did not articulate its rationale for that determination. Contrary to the State's suggestion (Pet. 20-22), however, the court of appeals' determination is consistent with decisions of this Court. In *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511, the Court considered the status of lands that were not within the boundaries of a formally recognized Reservation but that were held in trust by the United States for the benefit of the Tribe. The Court concluded that, because the trust land was "validly set apart for the use of the Indians as such, under the superintendence of the Government," the trust land "qualifie[d] as a reservation." *Ibid.*; see *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these [trust] lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for purposes of federal criminal jurisdiction at that particular time"); see generally *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (recognizing that Indian reservations, for purposes of 18 U.S.C. 1151(a), may be either "formal" or "informal").

It is thus of no present consequence whether, as the State contends, the agency lands were necessarily severed from the Reservation in 1894. Nothing in this Court's decisions, including *Yankton Sioux Tribe*, precludes such lands from subsequently gaining reservation status if taken into trust by the United States for the benefit of the Tribe. The State's assertion (Pet. 21) that the court of appeals' ruling with respect to the agency lands "contradicts the direct holding of *Yankton Sioux Tribe*" is therefore erroneous.

The State's concerns with respect to other categories of trust lands are premature. Because the court of appeals could not determine from the record or from counsel at oral argument what other trust lands remain within the original boundaries of the Yankton Sioux Reservation, the court remanded the matter to the district court "to make any necessary findings relative to the status of Indian lands which are held in trust." State Pet. App. 48. Indeed, in describing the court of appeals' decision as providing that such trust lands "may" or "might" possess reservation status (Pet. 20, 22, 24, 25), the State effectively concedes that questions concerning the status of those lands are not ripe for this Court's review. And for that reason, even if the Court were to grant the State's petition and agree with the State that the original Yankton Sioux Reservation was disestablished by the 1894 Act, the case would not furnish a suitable vehicle for definitively resolving the Indian country status of all lands within the boundaries of the original Reservation.

B. The Court Of Appeals' Holding That The Yankton Sioux Reservation Has Been Further Diminished Does Not Merit This Court's Review

We agree with the Tribe that the court of appeals erred in holding that the Yankton Sioux Reservation has been further diminished to the extent that allotted lands have passed out of Indian ownership. But we did not ourselves seek certiorari on that issue because, on balance, we concluded that the court's decision, while of undeniable significance to the parties here, is not of sufficiently general significance to warrant this Court's review, at least not at this interlocutory stage of the case. We adhere to that judgment now.

1. The court of appeals correctly recognized that "[c]ongressional intent is the touchstone for analyzing whether the 1894 Act altered the status of the nonceded lands," State

Pet. App. 26 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977)); that Congress's intent to diminish or disestablish a reservation must be "clear and plain," *ibid.* (quoting *Dion*, 476 U.S. at 738); and that such intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history," *ibid.* (quoting *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973)). This Court has consistently invoked those same principles in determining whether a particular reservation has been diminished.

The court of appeals, however, did not apply those principles correctly to the facts of this case. The court did not identify any language in the 1894 Act or the 1892 Agreement that "clear[ly] and plain[ly]" evinces an understanding that allotted lands would be separated from the Yankton Sioux Reservation when they passed out of trust status and were sold to non-Indians. Nor did the court identify such language in the negotiation records or the other legislative history. Cf. State Pet. App. 37 (noting that the U.S. Commissioners' reports on the negotiations with the Yankton Sioux "do not * * * mention any transfer of the Yanktons' tribal sovereignty").

Rather, the court of appeals relied on provisions of the 1894 Act, "read in its full historical context," that anticipated that tribal members would eventually receive fee title to their allotments, gain the ability to sell the allotments to non-Indians, and become taxpaying citizens of the State. State Pet. App. 42-43. For example, the court noted that Article V of the 1894 Act, which provided for a fund to support "local institutions for the benefit of [the] tribe," stated that the fund would be distributed once the Yankton Sioux "shall have received from the United States a complete title to their allotted lands, and shall have assumed all the duties and responsibilities of citizenship." *Id.* at 39, 42 (quoting 28 Stat. 315). The court viewed Article V as "contemplat[ing] a future in which such a fund would not be

needed," *id.* at 39, presumably because tribal members, as citizens, would then have access to state institutions. Such provisions do not, in our view, provide the requisite "clear and plain" indication of Congress's intent to diminish the Reservation.

We submit that the court of appeals' holding on the diminishment issue, while erroneous, is not erroneous in a manner that requires this Court's review at this time. The Eighth Circuit's disposition of the diminishment issue, like its disposition of the disestablishment issue, involves nothing more than the application of settled principles of law to the particular facts of this case. This Court rarely grants certiorari where, as here, the court of appeals' error appears to consist solely of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

2. The Tribe contends that the court of appeals' decision on the diminishment issue conflicts with various decisions of this Court and with a decision of the Tenth Circuit. We do not, however, perceive any square conflict with any of the decisions cited by the Tribe.

a. The court of appeals' holding that the Yankton Sioux Reservation has been further diminished does not, as the Tribe suggests (Pet. 9-14), conflict with any decision of this Court. To the extent that the Tribe relies on this Court's cases that presented diminishment claims, those cases concerned different reservations, different statutes opening those reservations to non-Indian settlement, and different circumstances surrounding the enactment of those statutes. See, *e.g.*, *Solem*, 465 U.S. at 472-481 (1908 Act opening the Cheyenne River Sioux Reservation for homesteading did not diminish the Reservation, but simply permitted non-Indians to settle within existing reservation boundaries); *Mattz*, 412 U.S. at 494-506 (1892 Act opening the Klamath River Reservation for homesteading did not diminish that Reservation). As noted above, the Court has repeatedly recognized that

the question whether a reservation has been diminished turns on the particular "language of the Act [opening the Reservation to settlement] and the circumstances underlying its passage." *Solem*, 465 U.S. at 469; accord *Hagen*, 510 U.S. at 410.

Other cases cited by the Tribe did not concern, as does this case, whether the original reservation boundaries continued to exist. Those cases instead concerned whether persons or activities on lands indisputably within the existing reservation boundaries were subject to regulation by the United States, the State, or the Tribe. See, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 557-567 (1981) (Crow Tribe had no authority to regulate non-Indian fishing and hunting on reservation lands owned in fee by non-members of the Tribe); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-483 (1976) (State had no authority to impose personal property tax on Indians residing within the Flathead Reservation, to impose license fee on Indians conducting tribal business within the Reservation, or to impose sales tax on sales by Indians to Indians within the Reservation; State could require Indian retailers to collect tax on sales to non-Indians within the Reservation); *United States* v. *Celestine*, 215 U.S. 278, 283-291 (1909) (United States had authority to prosecute a murder committed by an Indian on a trust allotment within the Tulalip Reservation). No conflict exists between the holdings of those cases and the holding of the Eighth Circuit in this case.[9]

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[9] The Tribe also suggests (Pet. 15-17) that the decision below conflicts with 18 U.S.C. 1151(a), which defines Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." The court of appeals did not acknowledge any tension between Section 1151(a) and its holding that the Yankton Sioux Reservation was diminished by the sale of former allotments to non-Indians. The court may have viewed Section 1151(a) as not applying to the threshold question,

b. Nor does the court of appeals' decision conflict, as the Tribe suggests (Pet. 20-22), with the Tenth Circuit's decision in *Ute Indian Tribe* v. *Utah* (*Ute Indian Tribe II*), 114 F.3d 1513 (1997), cert. denied, 522 U.S. 1107 (1998). As explained below, *Ute Indian Tribe II* arose in unusual circumstances that are not presented here.

In *Hagen* v. *Utah*, the Court held that the Uintah Reservation had been diminished as a result of 1902 and 1905 statutes that allotted lands within the Reservation to members of the Ute Indian Tribe and restored the remaining lands to the public domain. 510 U.S. at 421-422. The Court thereby resolved a conflict between the Tenth Circuit's decision in *Ute Indian Tribe* v. *Utah* (*Ute Indian Tribe I*), 773 F.2d 1087 (1985) (en banc) cert. denied, 479 U.S. 994 (1986), which held that the Reservation had not been diminished, and subsequent decisions of the Utah Supreme Court holding that the Reservation had been diminished. See *Hagen*, 510 U.S. at 408-409 (noting conflict).

While *Hagen* was pending, the Ute Indian Tribe moved in district court to enjoin the State from exercising jurisdiction on lands within the Uintah Reservation in a manner incon-

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presented in this case, of what "the limits of [an] Indian reservation" are. The court may instead have viewed Section 1151(a) as applying only after such limits have been ascertained (and thus as not precluding a determination that Congress intended that the limits of a particular Reservation would change with the transfer of fee-patented land out of Indian hands). Section 1151(a), if construed in such a manner, would not conflict with the decision below. We are aware of no decision of this Court or any court of appeals squarely accepting or rejecting such a construction of Section 1151(a). If the decision below proves to have a broader impact with respect to other existing Reservations where allotments have passed out of trust status, there will be time enough for this Court to grant review, either in this case after the proceedings on remand or in another case holding that the issuance of a fee patent to a parcel of allotted land and the subsequent sale of the land to a non-Indian removed the land from reservation status notwithstanding 18 U.S.C. 1151(a).

sistent with *Ute Indian Tribe I*. After this Court decided *Hagen*, the district court, which considered itself bound to enforce the mandate in *Ute Indian Tribe I* as the law of the case, invited the Tenth Circuit to recall the mandate. See *Ute Indian Tribe II*, 114 F.3d at 1519- 1520.

The Tenth Circuit modified its mandate only with respect to the portion of *Ute Indian Tribe I* that was directly in conflict with *Hagen—i.e.*, the portion that concerned whether lands that had been restored to the public domain remained within the Reservation. *Ute Indian Tribe II*, 114 F.3d at 1528-1531. The court thus did not disturb its earlier holding in *Ute Indian Tribe I* with respect to other lands, including those that had been allotted to tribal members and that had since passed into fee status. *Id.* at 1529-1530. The court explained that, "[b]ecause of the importance of finality," *id.* at 1520, only those portions of *Ute Indian Tribe I* that were not in direct conflict with *Hagen* would be modified, *id.* at 1527.

The procedural posture of *Ute Indian Tribe II* makes it unlike other diminishment or disestablishment cases, as the Tenth Circuit itself recognized. See 114 F.3d at 1515-1516. This case does not arise in a similar procedural posture. Nor does this case present the same finality concerns as did *Ute Indian Tribe II*, which involved an en banc decision that had been the law in the Tenth Circuit for a decade by the time of *Hagen*. In contrast, the boundaries of the Yankton Sioux Reservation have been constantly in litigation since the Tribe commenced this action in 1994.

3. Finally, the Tribe contends (Pet. 18-19), as does the State (Pet. 26-29), that the court of appeals' decision has implications for other reservations in the western United States. We do not expect that to be so. As explained above, the court's decision purports to be simply an application of well-settled principles of law to the particular circumstances of this case. Cases involving other reservations will neces-

sarily involve different statutes opening the reservation to settlement, different treaties or agreements between the United States and the Tribe, different historical circumstances, different subsequent settlement activity, and different treatment of the opened lands by the United States, the State, and the Tribe. See *Solem*, 465 U.S. at 469 ("It is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted).

In any event, because the case was remanded to the district court for a determination of precisely which lands within the diminished Yankton Sioux Reservation are Indian country, the court of appeals' decision is interlocutory in nature. If the decision below proves, contrary to our expectations, to have the pernicious consequences that the Tribe or the State suggests, the Court will have a further opportunity to review that decision, together with any subsequent decision of the court of appeals after the proceedings on remand are completed.

CONCLUSION

The petitions for a writ of certiorari should be denied.[10]

Respectfully submitted.

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MAY 2000

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[10] If the Court concludes, contrary to our submission, that review of the court of appeals' decision is warranted, we suggest that the Court grant both petitions, in order to ensure that it has before it the full range of issues going to both diminishment and disestablishment of the Reservation.

(3)

No. 99-1683

Supreme Court, U.S.
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In The

Supreme Court of the United States

YANKTON SIOUX TRIBE, and its individual members, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Petitioners,

v.

MATT GAFFEY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF STATE AND LOCAL GOVERNMENT PARTIES

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OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 188 F.3d 1010 (8th Cir. 1999), and is reprinted in the Appendix to the Petition for Writ of Certiorari in *South Dakota, et al. v. Yankton Sioux Tribe, et al.*, No. 99-1490 (hereinafter State's Petition), at App. 1-49. All references to "App." herein are to that Appendix.[1] The Memorandum Opinion and Order of the United States District Court for the District of South Dakota are reported at 14 F. Supp. 2d 1135 and are reprinted at App. 50-113.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit was entered on August 31, 1999. The Eighth Circuit denied timely petitions for rehearing and suggestions for rehearing en banc on December 8, 1999. App. 114.

STATEMENT OF THE CASE

Respondents submit that the "Statement of the Case" submitted by Petitioners here is inadequate and incorporate by reference the "Statement of the Case" set out in the State's Petition for Writ of Certiorari in No. 99-1490, at 3-11.

[1] The Petition filed by the Tribe in No. 99-1683 did not contain the appendices required by Supreme Court Rule 14.1(i).

REASONS FOR DENYING CERTIORARI

The tribal Petitioners request certiorari in this case with the end of overturning the court of appeals' determination that lands originally allotted to individual Indians and subsequently transferred to non-Indians do not constitute a "reservation" under 18 U.S.C. § 1151(a).

Certiorari should be denied. First, there is no conflict between the state and federal courts on this issue. They agree that the former "allotted" lands are neither "reservation" nor "Indian country." Second, as the United States acknowledges, there is no conflict among the federal courts with regard to the issue presented. U.S. Brief in Opp. 25-26. Third, turning to the merits, certiorari should not be granted because the Yankton reservation has, in fact, been disestablished; therefore, the tribal claim that allotted lands which have lost "Indian title" within the former reservation themselves constitute a "reservation" is necessarily in error. Finally, certiorari is not merited merely because the court below used incorrect language in its opinion. The court below came to the right result despite that language.

A. THERE IS NO CONFLICT BETWEEN THE FEDERAL AND STATE COURTS ON THE ISSUE WHETHER FORMER ALLOTTED LANDS CONSTITUTE A "RESERVATION."

The court of appeals clearly found that former allotted lands within the 1858 reservation constitute neither "Indian country" nor a "reservation." App. 47. The South Dakota Supreme Court, in finding the Yankton Reservation "terminated," *Bruguier v. Class*, 599 N.W.2d 364 (S.D.

1999) (App. 169, 171) necessarily found that the former allotted lands were not "reservation." Thus, there is no conflict between the state and federal courts on this issue, and none is alleged to exist.[2]

B. THE OPINION OF THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH ANY DECISION OF THE TENTH CIRCUIT COURT OF APPEALS.

The Tribe has not cited a single case of this Court or of a court of appeals in which a "cession and sum" agreement resulted in a "reservation" in the bizarre configuration it urges, including unextinguished allotted lands, extinguished allotted lands, and ceded lands once agency lands, but not other ceded lands. The Tribe has, therefore, settled on *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997), *cert. denied*, 522 U.S. 1107 (1998) (*Ute Indian Tribe II*), as the case on point. Indeed, the Tribe claims that *Ute Indian Tribe* is in "direct conflict" with the opinion below. *See* Tribe's Pet. 20. We agree with United States, however, that *Ute Indian Tribe* is without legal relevance. *See* U.S. Brief in Opp. 25-26.

In *Ute Indian Tribe II*, the Tenth Circuit Court of Appeals in 1997 considered the question of the extent to which a 1985 decision of the court of appeals in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986) (*Ute Indian Tribe I*) should be applied under the doctrine of "finality," regardless of the

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[2] The conflict between the federal and state courts addressed in the State's Petition for Certiorari in No. 99-1490 concerns the larger issue of whether the reservation has been wholly disestablished.

Supreme Court's later decision in *Hagen v. Utah*, 510 U.S. 399 (1994). *Ute Indian Tribe II*, 114 F.3d at 1521, in 1997 held that because the court's 1985 decision in *Ute Indian Tribe I* constituted a "final decision, a later change in law could not 'reopen the door already closed.' " That reasoning is entirely inapplicable here, even assuming that *Ute Indian Tribe II* was correctly determined. There is no question of a final judgment precluding relief here.

C. BECAUSE THE YANKTON SIOUX RESERVATION HAS BEEN "TERMINATED," FORMER ALLOTTED LANDS MAY NO LONGER CLAIM "RESERVATION" STATUS UNDER 18 U.S.C. § 1151(a).

1. *Yankton Sioux Tribe* Found That the Terms of the Yankton Agreement Parallel Language That Terminated the Lake Traverse Reservation; the Lower Courts Had No Alternative but to Likewise Find the Yankton Reservation Terminated.

In *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998), this Court (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1975)) held that the " 'cession' and 'sum certain' language" of Articles I and II of the Yankton Agreement "is 'precisely suited' to terminating reservation status." The Court continued:

> The terms of the 1894 [Yankton] Act parallel the language that this Court found terminated the Lake Traverse Indian Reservation in *DeCoteau*. . . .

Id. at 344. This Court did not itself determine that the Yankton Reservation was "disestablished . . . altogether," noting that it "need not determine" that issue. 522 U.S. at

358. Nonetheless, the language of this Court was so definitive that, after *Yankton Sioux Tribe*, the lower courts were bound to find the Yankton reservation terminated in the absence of some overwhelming showing of fact or law. No claim, however, can be made that anything in the facts or law allows the lower courts to overcome the *Yankton* language. Thus, the Yankton Sioux Reservation, like the Lake Traverse Reservation, has been "terminated."[3] Moreover, there can be no doubt as to the meaning of "terminated." *DeCoteau*, 420 U.S. at 446-47, found that the result of termination there was that

> exclusive tribal and federal jurisdiction is limited to the *retained* allotments. 18 U.S.C. § 1151(c). *See United States v. Pelican*, 232 U.S. 442.

(Emphasis added.) *See also DeCoteau*, 420 U.S. at 427 n.2. It follows, from *Yankton* and *DeCoteau*, that the Yankton Reservation, like the Sisseton Reservation, has been "terminated."

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[3] Petitioners and the United States complain that the Yankton Agreement could not have "terminated" the entire reservation because the cession and sum certain language applied only to the "ceded" lands and was irrelevant to the other lands. However, the cession and sum certain language of the Lake Traverse and Yankton Agreements is virtually identical in this regard. *See DeCoteau*, 420 U.S. at 456; App. 128-29. The complaint of the Petitioners and the United States is actually with *DeCoteau* itself.

2. Because the Yankton Reservation Was "Terminated," Allotted Lands Lost "Indian Country" Status When Their "Indian Title" Was "Extinguished."

Because the Yankton reservation was terminated, the court below did not err in finding that "allotted" lands lost "Indian country" status when their Indian title was extinguished. 18 U.S.C. § 1151(c), in fact, defines "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished. . . . " Thus, when the "Indian title" to the "allotments" *is* "extinguished," the lands lose their "allotted" status and the "Indian country" status attached to the "allotted" status. *See United States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997), *cert. denied*, 522 U.S. 841 (1997) (allotted lands outside of reservation boundaries "retained their allotment status, and they remain Indian country today *unless their Indian titles have been extinguished*") (emphasis added). The court below was therefore correct in finding that the allotted lands lost "Indian country" status when their "Indian title" was extinguished.[4] *See also Alaska v. Native Village of Venetie*, 522 U.S. 520, 528-30 (1998) (discussing origin and meaning of 18 U.S.C. § 1151(c)).

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[4] If the "allotted lands" *had* been found on a "reservation" as defined by 18 U.S.C. § 1151(a), they also would have lost their "allotted" status under 18 U.S.C. § 1151(c) when the Indian title was extinguished; nonetheless, they would have retained their "Indian country" status as part of a "reservation." This is because the transfer of ownership of lands on a reservation does not alter their "reservation" status. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

To demonstrate that the court below came to the wrong result in finding the allotted lands did not retain their "Indian country" status when transferred to non-Indians, the Tribe and the United States are therefore compelled, in effect, to reject this Court's finding that *Yankton Sioux Tribe* found that *DeCoteau* was on point and to argue that the Yankton Reservation was not "terminated." They fail in this attempt.

3. The Attempt to Distinguish *Yankton* and *DeCoteau* Fails.

Petitioners and the United States essentially ignore the central language of *Yankton* and *DeCoteau* set forth above. Each instead implicitly requests that this Court jettison its own finding of the legal identity between the two agreements and rely upon the supposed distinguishing factual characteristics. *See* Tribe's Pet. 10; Tribe's Brief in Opp. 11-13; U.S. Brief in Opp. 16-19. But the rulings of this Court may not be so easily defeated, and in any event, the so-called distinguishing characteristics do not stand up to close analysis.

a. The Yankton Indians Clearly Expressed a Desire To "Terminate" Their Reservation.

The Tribe and the United States rely heavily on the argument that the Sisseton Indians expressed a desire to terminate their reservation, but the Yankton Indians did not. This analysis is untenable in light of the passage from *Yankton Sioux Tribe* quoted above which finds that the very language of the Yankton Agreement was " 'precisely suited' " to "terminating" the reservation. *Yankton*

Sioux Tribe, 522 U.S. at 344. The language of an agreement, of course, is the very best source of a party's intentions.

The argument that the Yankton negotiations did not demonstrate a tribal intention to disestablish the reservations is, moreover, refuted by this Court's finding that the "Commissioner's report of the negotiations signaled their understanding that cession of the surplus lands *dissolved tribal governance of the 1858 reservation*." 522 U.S. at 353 (emphasis added). This Court also quoted the language of a critical letter written by three Yankton Chiefs and more than 100 members of the Yankton Tribe to Congress stressing, inter alia, that they wanted the " 'laws of the . . . State we live in to be recognized and observed,' " a concept totally incompatible with a desire to retain reservation status. 522 U.S. at 353 (quoting S. Misc. Doc. No. 134, 53d Cong., 2d Sess., 1 (1894)). These passages are clearly equivalent to those claimed by the United States and the Tribe to be of importance in *DeCoteau*.[5]

b. The Remaining Provisions of the Yankton Agreement Strongly Argue for Disestablishment.

Contrary to arguments made here, the remaining articles of the 1894 Agreement, i.e., those other than the

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[5] The implicit argument of the Petitioners is that language of an Agreement is a blank slate upon which it, the United States, or the courts can write whatever seems convenient 100 years later by extracting bits of history from a variety of sources. The law, however, turns to the language of the agreements as having the critical meaning.

critical "cession and sum certain" articles, argue even more strongly for disestablishment than did the remaining articles of the Lake Traverse Agreement. The majority of the remaining provisions of the 1894 Agreement set out a method of payment during the twenty-five year trust period, indicating an understanding that the government's interest would extend only through that time – i.e. the twenty-five year *trust allotment* period, and not permanently, as in the care of a "reservation." *See generally DeCoteau*, 420 U.S. at 432, 434, 441 (operation of the General Allotment Act in the context of the Lake Traverse disestablishment). In particular, Articles III and IV (App. 129-30) set up a payment plan for the $500,000 which remained after the first $100,000 was paid. Article IV tied the entire payment scheme to the twenty-five year trust period and provided that the $500,000 should be payable "at the pleasure of the United States after twenty-five years. . . . " App. 130. The section stated that "during the trust period of twenty-five years" the United States could pay part of the principal sum as the Secretary of the Interior might recommend. *Id.*

Article V set up the possibility of a fund from the "interest" due on the remaining payments. *Id.* The United States has argued that this fund is persuasive of permanent "reservation" status. However, the "interest" would be due on the funds *only* for the twenty-five year period in which the United States would hold them. *Id.* Moreover, the fund was "discretionary" with the Secretary of the Interior, and he did not, in fact, set up any fund. *Yankton Sioux Tribe v. United States*, 623 F.2d 1159, 1181-82 (Court of Claims 1980). Article V, in turn, is tied to Article XI (App. 133-34), which provided that if any member of

the Tribe "shall within twenty-five years die without heirs," his property would be sold and the funds added to the Article V fund. Article XI thus provides funding only during the twenty-five year trust period and allows the sale of "allotted lands" on the death of allottees without heirs during that twenty-five year period. It contemplated a diminution, even during the twenty-five year trust period, of the amount of land held by Indians. Similarly, Article IX provided that during the "trust period of twenty-five years" the superintendent of the agency could approve the leasing of certain lands owned by allottees. App. 132. That authority *expired*, by its terms, however, at the end of the twenty-five year trust period.

Nor does Article VIII (App. 132) of the Yankton Agreement distinguish the *Yankton* case from *DeCoteau*. Article VIII simply provided that a small amount of land *ceded* by the Tribe to the government, and paid for by the government, would be reserved from sale to settlers "until they are no longer required" for the agency purposes. *Id.* This does not distinguish the cases, however, *for the United States also retained lands for an agency and schools at Lake Traverse, a fact not denied by any party. See, e.g.*, Ex. 572 (1898 Indian agent makes references to "agency headquarters" at Lake Traverse, to "location of the agency buildings," to a boarding school, and to a farm tract comprised of "480 acres of good land," forty of which were in cropland. *See also DeCoteau*, 420 U.S. at 435 n.16 (" 'the Government should own the lands upon which the agency and school buildings are located' ").

It is not surprising, moreover, that lands were retained in both areas because services would have to be

provided regardless of "reservation" status. *See DeCoteau*, 420 U.S. at 442; 1998 Transcript 47 (former Lake Traverse Superintendent and present Yankton Superintendent testify that services provided in two areas were "comparable"). *See also Native Village of Venetie*, 522 U.S. at 534 ("mere provision" of benefits does not support finding of "Indian country").

Similarly, the United States has seized on this Court's comment regarding Article VIII as decisive. In the passage relied upon, *Yankton Sioux Tribe*, 522 U.S. at 350, reference is made to "virtually identical" language[6] in *Solem v. Bartlett*, 465 U.S. 463, 474 (1984), which ultimately found the reservation there *not* to be diminished at all. The *Yankton* Court, however, *has found* the Yankton reservation to be at least diminished; it has thus weighed, and found wanting, the impact of the provision in the context of the Yankton "cession and sum certain" agreement (as opposed to a "sell and dispose" agreement at issue in *Solem*).

Finally, the United States continues to argue that because the gross amount of land ceded in *DeCoteau* was

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[6] We respectfully submit that the provisions are not "virtually identical." In *Solem*, the lands were simply reserved from sale to the settlers; the Tribe actually retained ownership of the lands and received no consideration for them. At Yankton, the lands were "ceded" by the Tribe to the United States for payment. App. 20. Moreover, in the Yankton case, Congress ultimately rid the United States of the agency lands when they were no longer needed for agency, school, and similar purposes. *See* Ex. 627.

greater than in *Yankton*, the cases should be distinguished. The United States has not identified any precedent establishing this difference. In any event, the more important statistics establish that the actual amount of land *retained* in allotted status in the two former reservations was about equal: 256,000 acres in Sisseton, *see DeCoteau*, 420 U.S. at 435 n.16, and 262,000 acres at Yankton. *Yankton*, 522 U.S. at 336. Moreover, the *per capita* land retained in allotted status was quite similar, 152 acres per capita at Sisseton and 168 acres per capita at Yankton. (Figure derived from acreage statistics set out above and 1890 census at Ex. 610.)

4. Disestablishment Also Flows From the Finding That the 1858 Boundaries Were Eliminated.

A finding of disestablishment also necessarily follows from the fact that the 1858 reservation boundaries were eliminated by the 1894 Act. *Yankton Sioux Tribe*, 522 U.S. at 345 states: "The 1894 Act is also readily distinguishable from surplus land Acts that the Court has interpreted as maintaining reservation boundaries." This Court also found that the record contained "no discussion of the preservation of the 1858 boundaries." *Id.* at 347. The court below thus correctly concluded that "the 1858 reservation boundaries did not remain intact following passage of the 1894 Act." App. 25. The record is likewise clear there were no discussions of any *changed* or *new* boundaries. *See, e.g.*, App. 37; App. 73. It follows that the parties must not have intended to create new boundaries.

As demonstrated above, the courts have consistently recognized the importance of the discussion of the boundary issue in determining "reservation" status. Here there is none. Nor is it sufficient to simply *imply* that *new* boundaries were permanently set around the "allotted lands" which are noncontiguous and in some cases quite scattered. *See* Gov't. Ex. 3 (map). There is no evidence that the government negotiators or the Tribe believed that these lands constituted a permanent "reservation." They did not say so, and such was not the experience of the Yankton Sioux Tribe. *See* Treaty of 1858 (App. 115). Nor was there *any* other contemporaneous example cited by the Tribe or any negotiator in 1892 in which scattered, noncontiguous "allotted" lands constituted a "reservation." In short, there is no way the negotiators, the Tribe, or the Congress could recognize what is now being posited as a permanent "reservation" to be such. It follows that the taking down of the boundaries, a fact found by this Court and acknowledged by the Eighth Circuit, strongly counsels a finding of disestablishment, for if there are no "reservation boundaries" there is no "reservation."[7]

Finally, as set forth above, when the "Indian title" to "allotted" land outside a reservation is "extinguished", its "Indian country" status is lost. 18 U.S.C. § 1151(c). The court below thus came to the correct conclusion that the

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[7] There may, of course, be other kinds of "Indian country" in this area such as "allotments" whose Indian titles are not "extinguished" or "dependent Indian communities." *See* 18 U.S.C. § 1151(b) and (c); *Native Village of Venetie*, 522 U.S. at 528-31.

"allotted" lands at issue *here* lost their "Indian country" status when their "Indian title" was "extinguished." *See* Section C.2, *supra*.

D. THE AMBIGUITY AND OCCASIONAL INCORRECT USE OF LANGUAGE BY THE COURT OF APPEALS DOES NOT REQUIRE THIS COURT'S INTERVENTION BY WAY OF GRANT OF A WRIT OF CERTIORARI WITH REGARD TO FORMER ALLOTTED LANDS, BECAUSE THE COURT BELOW REACHED THE RIGHT RESULT.

It is true that the court of appeals erred in its use of certain Indian law terminology. In particular, the court of appeals erred when it inappropriately referred to the "allotted lands" which remained in Indian hands after 1894 as "reservation." *See, e.g.*, App. 43. The Tribe attempts to bootstrap the error into grounds which demand the grant of certiorari with regard to the allotted lands which then *left allotted status*, the lands at issue here. Tribe's Pet. 6.

However, no action of this Court is necessary to correct the error in the court's language because the court below at App. 47 came to the right *result* with regard to former allotted lands;[8] i.e., the "allotted" lands lost "Indian country" status at the time their Indian title was extinguished. *See* 18 U.S.C. § 1151(c).[9] This necessarily

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[8] For analogous reasons, the Tribe is incorrect in arguing that certiorari is merited because the decision below "conflicts with 18 U.S.C. § 1151(a)." Tribe's Petition 15-17.

[9] The court below may have assumed that because "allotted lands" were treated as "Indian country" after 1894, they must be

follows with regard to any former allotted lands found outside of a reservation. *See also,* Section C.2, *supra.*

As we have demonstrated, there is no conflict between the state and federal courts with regard to the former allotted lands, nor is there a conflict among the federal courts. If the decision below is left intact with regard to the former allotted lands, the lands will continue to be treated as they have been treated for the last century – i.e., as areas not constituting "Indian country" and as within the State's jurisdiction, a fact that all of the courts have acknowledged. *See, e.g.,* App. 45.

Thus, tribal request for a grant of certiorari, a request premised on the former allotted lands, should be rejected as imposing an unnecessary burden upon this Court and the parties. *See also,* U.S. Brief in Opp. 21-23 (opposing certiorari).

"reservation." The reasoning would miss the point that the "Indian country" status of the "allotments" attached because of their "allotted" status, not because of a "reservation status." As *Native Village of Venetie,* 522 U.S. at 528-29, confirms, allotments were sometimes carved out of diminished reservations and remained "Indian country" as "allotments" and not as "reservations"; the United States retains its obligation of " 'governmental care' " for the areas. That status lasts only so long as the "Indian title" remains unextinguished, however. 18 U.S.C. § 1151(c); *Stands,* 105 F.3d at 1572.

CONCLUSION

The Tribe's Petition should be denied.

Respectfully submitted,

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No. 99-1683

IN THE

Supreme Court of the United States

YANKTON SIOUX TRIBE, and its individual members, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,
Petitioners,

v.

MATT GAFFEY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF BRIEF IN OPPOSITION OF STATE AND LOCAL GOVERNMENT PARTIES

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IN THE

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No. 99-1683

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v.

MATT GAFFEY, State's Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,

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BRIEF OF CITIES DANTE, GEDDES, LAKE ANDES, PICKSTOWN, PLATTE, RAVINIA AND WAGNER, *AMICI CURIAE*, IN SUPPORT OF BRIEF IN OPPOSITION OF STATE AND LOCAL GOVERNMENT PARTIES

INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37(4), the Cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner, as *amici curiae*, filed a brief in No. 99-1490, in support of Petitioners State of South Dakota, Charles Mix County, and Southern Missouri Waste Management District. Pet. for Writ of Cert., *South Dakota v. Yankton Sioux Tribe*, No. 99-1490, (Mar. 7, 2000). The interest of these Cities is more fully set forth in that brief. In this action, No. 99-1683, the Cities file this brief pursuant to Supreme Court Rule 37(4) as *amici curiae* in Support of the Brief filed by the State and Local Government Parties in Opposition to the Petition filed by the Yankton Sioux Tribe.

In both instances, the Cities primarily track the arguments of the United States. The relentless advocacy of the United States figures prominently in the conflict and confusion in this case and in related cases.

Throughout the remand in this case, the United States argued that the 1858 reservation boundaries should be recognized. The United States now agrees that the Petition of the Yankton Sioux Tribe seeking to reestablish those boundaries should be denied. The United States should have restricted the scope of its Brief in Opposition to that issue.

Instead, the United States also opposes the Petition of the State and Local Government Parties. If this Court accepts the position of the United States and also denies the Petition of the State and Local Government Parties, the Cities will certainly face several more years of unnecessary litigation.

Importantly, other units of local government across the United States can also look forward to similar treatment as the United States seeks to build upon the newly fashioned court-created "agency reservation" adopted by the court of appeals. The potential extension of that reservation concept through the unprecedented Indian country/Indian reservation issue that the court of appeals inserted in this remand *sua sponte* also prom-

ises more divisive jurisdictional uncertainty in South Dakota and in other States.[1]

ARGUMENT

I. THE DECISION OF THE UNITED STATES NOT TO FILE A PETITION IN THIS CASE IS SIGNIFICANT.

We think we understand why the United States decided not to file a Petition for Writ of Certiorari in this case. A Petition by the United States would have necessarily underscored the fact that, on remand, the United States advanced an argument contrary to the express holding of this Court in *Yankton I* with reference to the disestablished 1858 Yankton boundaries.

In *Yankton I*, this Court clearly resolved the issue of the 1858 boundaries:

> This case presents the question *whether*, in an 1894 statute that ratified an agreement for the sale of surplus tribal lands, Congress *diminished the boundaries* of the Yankton Sioux Reservation....
>
> *States* acquired primary jurisdiction over unallotted opened lands where "the applicable surplus land Act freed that land of its reservation status and *thereby diminished the reservation boundaries*."...*In contrast*, if a surplus land Act "simply offered non-Indians the opportunity to purchase land *within* established reservation boundaries," *id.*, at 470, 104 S.Ct., at 1166, then the *entire opened area* remained

---

[1] At the same time, the United States is already seeking to restrict the general cession principles recognized in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) ("*Yankton I*"), in federal criminal cases in the process of resurrecting the original boundaries of Indian reservations. *See United States v. Webb*, No. CR98-080-N-EJL (D. Idaho Jan. 12, 1999) (Memorandum Decision and Order), *argued* No. 99-30155 (9th Cir. Mar. 9, 2000) and *United States v. Scott*, No. CR98-01-N-EJL (D.Idaho June 25, 1998) (both involving the "similar" 1894 Nez Perce cession noted in *Yankton I*, 522 U.S. at 339, 353-354.

> *Indian country*. Our touchstone to determine whether a given statute *diminished or retained reservation boundaries* is congressional purpose.
>
> The 1894 Act is also readily *distinguishable* from surplus land Acts that the Court has interpreted as *maintaining reservation boundaries....In contrast,* the 1894 Act at issue here....
>
> The Yankton Tribe and the United States, appearing as *amicus* for the Tribe, rest their argument against diminishment primarily on the saving clause in Article XVIII of the 1894 Act. The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the *existing reservation boundaries were maintained.* The United States urges a similarly "holistic" construction of the agreement... Moreover, the Government's contention that the Tribe intended to cede some property but maintain the entire reservation as its territory *contradicts* the common understanding of the time: that tribal ownership was a critical component of reservation status....
>
> [W]e *conclude* that the saving clause pertains to the *continuance* of annuities, *not the 1858 borders.*
>
> [T]he record of the negotiations between the Commissioners and the Yankton Tribe contains *no discussion* of the *preservation* of the *1858 boundaries*....
>
> [T]he Commissioners' report of the negotiations signaled their understanding that the cession of the surplus lands *dissolved* tribal governance of the *1858* reservation.

Yankton I, 522 U.S. at 333, 343, 345, 345-346, 347, 353 (emphasis added).

Importantly, as this Court noted, the United States participated in *Yankton I* as *amicus curiae*.

In the *Yankton* Sioux *Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) (*"Yankton II"*) remand, the United States nevertheless pressed for the courts to recognize the 1858 reservation bounda-

ries. The court of appeals recognized this conflict, rejected the views of the United States and confirmed this aspect of this Court's decision in *Yankton I* directed to the 1858 Yankton reservation boundaries.

> The *Yankton* Court did make a number of explicit references to the status of the reservation boundaries. The Court found the 1894 Act distinguishable from those acts which it "has interpreted as maintaining reservation boundaries." *Yankton*, 118 S.Ct. at 799. The question before it was described as whether the 1894 Act "diminished the boundaries" of the reservation. *Id.* at 793. The Court distinguished situations in which states acquired primary jurisdiction over opened lands and "thereby diminished the reservation boundaries" from those in which the entire opened area remained Indian country even though non-Indians were able to purchase land. *Id.* at 797-98 (citations omitted). In the Commission reports it found evidence that the 1894 Act involved alteration of "the reservation's character" and "a reconception of the reservation." *Id.* at 802. Some of the language was "reminiscent" of that used for the diminished Unitah [sp] reservation. *Id.* ("Congress would 'pull up the nails' holding down the outside boundary" of the reservation) (citation omitted). The Court went on to hold that the savings clause of Article XVIII "pertains to the continuance of annuities, *not the 1858 borders*." *Id.* at 800 (emphasis added). These references indicate the Court's understanding that the 1858 reservation boundaries did not remain intact following passage of the 1894 Act.
>
> The Tribe is able to identify only one reservation which apparently continues to have its original boundaries even though some of the land within the boundaries has lost its reservation status—the Unitah [sp] Valley Reservation. The peculiar procedural history of the litigation involving that reservation does not suggest that it is precedent for maintenance of the original exterior borders of the Yankton Sioux Reservation....

> Based on our interpretation of what the Court said in *Yankton*, the lack of controlling precedent to suggest the original reservation boundaries can be maintained despite the extent of the diminishment, and the record before the court which we discuss below, we conclude that the original exterior boundaries of the Yankton Sioux Reservation do not serve to separate Indian country from areas under primary State jurisdiction....
>
> We recognize that the original exterior treaty boundaries of the reservation have *not* been maintained. *See Yankton*, 118 S.Ct. at 799-800....
>
> [T]he judgments are reversed in so far as the court concluded that the 1858 exterior reservation boundaries remain intact....

Yankton II, 188 F.3d at 1020-1021, 1030 (emphasis added).

The United States did not want to explain to this Court how it could ignore the holding of this Court in *Yankton I* in this manner. If the United States did not file a petition, it would not have to do so. As a result, the United States has simply agreed with the State and Local Governments that the Petition of the Yankton Sioux Tribe on this issue should be denied. According to the United States, no further explanations are necessary. The Cities, of course, support the ultimate conclusion of the United States that the Tribe's Petition should be denied. However, the path the United States chose to follow in this case is not a commendable one, to say the least.

II. THE PRIMARY ARGUMENTS SUBMITTED BY THE YANKTON SIOUX TRIBE AND THE UNITED STATES ARE INHERENTLY INCONSISTENT.

The briefs filed by the Yankton Sioux Tribe and the United States are truly remarkable. The primary argument submitted in each brief is flatly inconsistent and self-defeating. The conflict-

ing issue in this case centers around congressional intent. With reference to congressional intent, the Yankton Sioux Tribe and the United States have backed themselves into an impossible position.

Congress could have intended any *one* of three different results with reference to the boundaries of the Yankton Indian Reservation. Congress could have intended to leave the 1858 reservation boundaries intact, extinguish the 1858 reservation boundaries, or create new reservation boundaries around a smaller reservation. These are the *only* three options.

Incredibly, the position of the Yankton Sioux Tribe and the United States is premised on supporting *two* of these options at the *same* time. The Yankton Sioux Tribe and the United States have tried to have their cake and eat it too. This is an impossible position.

First, the Yankton Sioux Tribe and the United States maintain that Congress intended to leave the 1858 Yankton Reservation boundaries in place. Pet. for Writ of Cert., *Yankton Sioux Tribe v. Gaffey* at 5, No. 99-1683 (April 17, 2000); Br. for the United States in Opp'n at 8 n.5, 13, 21, 23, *South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000). At the same time, however, the Yankton Sioux Tribe and the United States also submit that the court of appeals "correctly" recognized that Congress intended to create a diminished reservation that corresponds with the agency reserve—an action wholly unnecessary if the 1858 reservation boundaries were still in place. Br. for Yankton Sioux Tribe in Opp'n, at 10-11 *South Dakota v. Yankton Sioux Tribe,* No. 99-1490 (May 8, 2000); Br. for the United States in Opp'n, at 13, *South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000).

Importantly, nothing in the Yankton documentation supports any of this. In this respect, the position of the Yankton Sioux Tribe and the United States is self-defeating.

Of course, neither the Yankton Sioux Tribe nor the United States structure their argument in such a way that this inconsistency appears obvious at first glance.

A. The Yankton Sioux Tribe Submits That Congress Intended To Leave The 1858 Yankton Reservation Boundaries Intact And, At The Same Time, Create An Agency Reservation Within Those Boundaries.

In its brief in opposition, the Yankton Sioux Tribe now supports the "agency reservation" as recognized by the court of appeals simply because of the "unique facts" of this case. Br. of the Tribe in Opp'n at 10. *See also* reference to "fact-based" determination that the reservation was not disestablished in the Pet. for Writ of Cert. at 6 n.3, No. 99-1683, filed by the Yankton Sioux Tribe. As a result of these "unique facts", the Yankton Sioux Tribe concludes that the court of appeals decision is correct in this respect, and that the Petition of the State and Local Government Parties should therefore be denied. *Id.* at 10-11.

Significantly, the Yankton Sioux Tribe never mentions the primary argument in its Petition in No. 99-1683 which is based on the opposite conclusion: that Congress *never* intended to alter the 1858 boundaries of the Yankton Sioux Reservation. Petition of Yankton Sioux Tribe at 5-6.

In the court of appeals, the Tribe's argument regarding *Yankton I* and the 1858 boundaries was most succintly stated:

> *Nothing* in the *South Dakota v. Yankton Sioux Tribe* opinion *touched* on the Reservation's *boundaries*....the Court left *untouched* the 1858 Treaty, which set out the *boundaries* of the Reservation. One can draw no other conclusion than that the 1858 *boundaries* remain *intact*, minus the 160,000 acres of unallotted lands.
>
> Justice O'Connor dealt with Article XVIII only in terms of restricting it to annuities. Her conclusions with respect to Article XVIII do *not* deal with *boundaries*, except to

> hold that the Article did *not* apply to the *boundaries*. Beyond shrinking the 430,000 acre Reservation by 160,000 acres, the Supreme Court left *untouched* the Treaty of 1858, which in fact did set out the *boundaries* of the Yankton Sioux Reservation, and which specifically were *not* changed by the Supreme Court in its opinion.

Appellee Yankton Sioux Tribe's Reply Br. at 24, *Yankton II*, Nos. 98-3893, 3894, 3896, 3900 (8th Cir. Mar. 11, 1999) (emphasis added).[2]

The court of appeals correctly rejected the 1858 boundaries argument of the Yankton Sioux Tribe, as noted *supra* at 5-6. The *Bruguier* opinion of the South Dakota Supreme Court confirms that conclusion. There is no conflict on this issue between

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[2] The Yankton Sioux Tribe also does not mention the fact that the question of an agency reservation was not briefed or argued in either the district court or the court of appeals. Moreover, immediately after the decision of the court of appeals, *the Yankton Sioux Tribe squarely rejected the concept of an agency reservation*. As the Yankton Sioux Tribe noted in its application for a stay in the court of appeals:

> The parties to this appeal argued in their petitions for rehearing that prior Supreme court cases allowed for *two* possible resolutions to the captioned appeal [1858 reservation boundaries in tact or extinguished]. The circuit decision creates a third option, which appears to be *inconsistent with all prior Supreme court cases*. Whether the Supreme Court will approve this third option is *clearly substantial issue*.

Mot. for Stay Pending Pet. for Writ of Cert., *Yankton II*, 188 F.3d 1010 (8th Cir. 1999) (Nos. 98-3893, 3894, 3896, 3900) (emphasis added).

On this point, the Yankton Sioux Tribe was clearly correct the first time. The Yankton documentation does not support an agency reservation and no one argued that it did. In addition, the decision of the Supreme Court of the State of South Dakota in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999) confirms the scope of this separate conflict within the letter and spirit of Supreme Court Rule 10(5).

the court of appeals and the state supreme court. The Petition of the Yankton Sioux Tribe in No. 99-1683 should be denied.

B. The United States Also Submits That Congress Intended To Leave The 1858 Yankton Reservation Boundaries Intact And, At The Same Time, Create An Agency Reservation Within Those Boundaries.

Incredibly, the United States makes the same conflicting argument regarding congressional intent. The United States continues to maintain that the court of appeals "erred" in not recognizing the 1858 reservation boundaries. Br. for the United States in Opp'n, at 8, n.5 13, 21, 23, *State of South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000). At the same time, the United States, like the Yankton Sioux Tribe, maintains that the court of appeals "correctly concluded" that the Congress intended to create a new agency reservation. Id. at 13.

The United States finesses this flatly inconsistent position by placing the agency reservation issue in the context of the absence of a clear indication of congressional intent to disestablish the Yankton Reservation. Br. for the United States in Opp'n, at 9-13, *State of South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May, 8, 2000). Nevertheless, the argument of the United States remains as fundamentally flawed as that of the Yankton Sioux Tribe. Congress could not have intended to maintain the 1858 reservation boundaries and, at the same time, create new boundaries for a new agency reservation. Again, nothing in the Yankton documentation is even asserted to support this conflicting position.

In the alternative, the United States now also suggests that the agency lands could have subsequently gained reservation status. Br. for the United States in Opposition at 20, *Yankton Sioux Tribe v. South Dakota*, Nos. 99-1490 and 99-1683 (May 8,

2000). Even here, however, the United States does not explain why Congress would have adopted this course of action if the 1858 reservation boundaries were still intact.

With reference to the 1858 boundaries, contrary to the argument of the United States, the court of appeals correctly confirmed that the boundaries were extinguished by the 1894 Act. *See Yankton II*, 188 F.3d at 1020-1021, 1030, *supra* at 5-6. Compounding the conflict and the confusion in this instance is the additional fact that *the United States initially conceded that this Court held that the 1858 reservation boundaries were extinguished in Yankton I.*

> [T]he United States Supreme Court found the savings clause *insufficient* to maintain the reservation boundaries of the 1858 Treaty here, and thus did not prevent diminishment of the Reservation...

Summ. J. Br. for the United States at 22 n. 5, *Yankton II*, 14 F.Supp.2d 1135 (D.S.D. 1998) (No. 98-4042) (emphasis added). *See also* Summ. J. Br. for the United States at 2,5,6.

Predictably, the United States mentions none of this in the Brief in Opposition. As the Cities correctly noted in their *amici* brief in 99-1490, the arguments of the United States steer clear of even mentioning reservation boundaries. Br. of Cities in Supp. of Pet'rs at 18, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490, (Mar. 7, 2000).

Moreover, in the process the United States has once again failed to honor the position advanced by the Office of the Solicitor General in this Court in *Yankton*, (i.e., that disestablishment was inevitable if the argument of the United States regarding Article XVIII was rejected and the 1858 Yankton boundaries were not recognized by this Court, because *nothing* in the Yankton documentation supported any other conclusion.) Br. for United States, Cities App. 202a-232a; Tr. of Oral Argument at 270a-271a, *Yankton I*, 522 U.S. 329 (1998) (No. 96-1581), Cities App. 266a.

As noted supra at 5-6, the court of appeals recognized that *Yankton I* resolved the issue of the 1858 reservation boundaries and squarely rejected the new argument of the United States. The *Bruguier* opinion of the South Dakota Supreme Court unequivacally supports the court of appeals on this point. There is no conflict for this Court to resolve on this issue.[3]

---

[3] In the final analysis, the conflict and confusion in both the Brief in Opposition of the Yankton Sioux Tribe and the Brief in Opposition of the United States lend further support to the Petition filed by the State and Local Government Parties. The congressional intent conflict further highlights the fact that nothing in the Yankton documents supports an agency reservation as recognized by the court of appeals. And, the United States has already conceded (as the State and Local Brief in Opposition points out) that the court of appeals "did not articulate its rationale for that determination." Br. for the United States in Opp'n, at 20, *State of South Dakota v. Yankton Sioux Tribe* and *Yankton Sioux Tribe v. Gaffey*, Nos. 99-1490 and 99-1683 (May 8, 2000).

In this light, the holding of court of appeals cannot be said to be fact bound or otherwise so limited as not to qualify for this Court's review at this time. The Yankton Sioux Tribe was correct when it acknowledged that the court of appeals holding is "inconsistent with all prior Supreme Court cases" and concluded that this holding would present this Court with a substantial issue for consideration. Mot. for Stay Pending Pet. for Writ of Cert., *Yankton II*, 188 F.3d. 1010 (8th Cir. 1999) (No. 98-3893, 3894, 3896, 3900). Moreover, the "disestablished" and "terminated" holding of the South Dakota Supreme Court in *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999) reinforces and solidifies the substantial nature of the inconsistencies and conflict between the court of appeals and the Supreme Court of the State of South Dakota on this issue. In some fashion, this Court should resolve that conflict. *See* the suggestion of the State of South Dakota, Charles Mix County, Southern Missouri Waste Management District, and the Cities regarding Summary Disposition. Pet. for Writ of Cert., at 3 n.2, *South Dakota v. Yankton Sioux Tribe*, No. 99-1490 (Mar. 7, 2000); Br. of Cities in Supp. of Pet'rs at 3 n.1, No. 99-1490 (Mar. 7, 2000).

CONCLUSION

For the foregoing reasons, and those stated in the Briefs in Opposition of the United States and the State and Local Government Parties, the Petition of the Yankton Sioux Tribe should be denied.

Respectfully submitted this 24th day of May, 2000.

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Supreme Court, U.S.
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No. 99-1683

In The

Supreme Court of the United States

YANKTON SIOUX TRIBE, and its individual members, United States of America, on its own behalf and for the benefit of the Yankton Sioux Tribe,

Petitioners,

v.

MATT GAFFEY, States Attorney of Charles Mix County; HERMAN PETERS, Member of the Charles Mix, South Dakota, County Commission; BRUCE BAKKEN, Member of the Charles Mix, South Dakota, County Commission; JACK SOULEK, Member of the Charles Mix, South Dakota, County Commission; WILLIAM JANKLOW, Governor of South Dakota; MARK W. BARNETT, Attorney General of South Dakota,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Two parties and one amicus curiae have responded to the Yankton Sioux Tribe's petition for a writ of certiorari, and this reply will respond to the arguments in each of those responses.

I. YANKTON SIOUX REPLY TO STATE OF SOUTH DAKOTA

The Eighth Circuit Court of Appeals made two primary holdings in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (1999) (hereinafter *Yankton II*). The Court held:

1. The Yankton Sioux Reservation was not disestablished by congressional act in 1894.
2. The Yankton Sioux Reservation was further diminished after 1894 as individual allotments passed out of Indian hands.

In its petition for a writ of certiorari, the Yankton Sioux Tribe seeks review of the latter of these two holdings, but not the former. The Tribe's petition shows that if the Reservation was not disestablished, then under prior decisions of this Court, and under 18 U.S.C. § 1151, allotments continue to be part of the Reservation. The Tribe also demonstrates that correction of the Court of Appeals error is of exceptional importance.

The state does not and cannot dispute the Tribe's argument on these points. The State does not dispute that holding 2 above is inconsistent with prior decisions of this Court.[1] The State also does not dispute the importance of the issue raised by the Tribe.

---

[1] The Tribe also argued the Court of Appeals decision was inconsistent with *Ute Indian Tribe v. Utah*, 114 F.2d 1513 (10th Cir. 1997). The inconsistency with *Ute Indian Tribe* is premised upon the continued existence of the Yankton Reservation after 1894. Because the State concedes that, if the Reservation continues to exist after 1894, the Eighth Circuit Court of Appeals decision is inconsistent with Supreme Court case law, it is not necessary to

Instead the state correctly points out that the Tribe's argument is explicitly premised on the Court of Appeals determination that the Reservation continued to exist after 1894, and the state repeats its flawed attack upon that premise. The State's argument that the Yankton Sioux Reservation was disestablished is based upon its contention that this case is indistinguishable from *DeCoteau v. District County Court*, 420 U.S. 425 (1975). Because the State's response merely repeats the argument contained in its petition, the Tribe refers the Court to the Tribe's responses to the State's petition.[2] As discussed in detail in that response, the Court of Appeals distinguished this matter from *DeCoteau* on three separate bases, and the State argues those distinctions are based upon erroneous findings of fact. The State also alleges the Court of Appeals misapplied a properly stated rule of law. The errors alleged by the State do not merit review by this Court. Sup. Ct. R. 10.

The United States response to the State provides further basis to reject the State argument. The United States provides a detailed analysis of the history of the negotiation of the Sisseton and Yankton agreements, to show the differences between this matter and *DeCoteau*. While the United States response provides an excellent analysis, they miss a key point with regard to the Yankton Sioux's understanding of sale of land for a sum certain. Under this Court's precedent, treaties with Indians are to be interpreted to give effect to the terms as the Indians themselves would have understood them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). Such interpretation requires the Court to look to the

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determine whether it is also inconsistent with decisions of another Circuit Court of Appeals.

[2] The Tribe also refers the Court to the State's reply to the Tribe's response. In its reply, the State does not attempt to counter the well-reasoned arguments of the Tribe with regard to the distinction between this matter and *DeCoteau*.

specific history of negotiation, including events which shed light on the contemporaneous understanding of the agreement. *Hagen v. Utah*, 510 U.S. 399, 411 (1994); *Solem v. Bartlett*, 465 U.S. 463, 469 (1984).

Applying those principles to the history of negotiation in this case, the Yankton Sioux understood that sale of land for a sum certain did not disestablish a Reservation. The Yankton agreement was made two years after the agreement at issue in *DeCoteau*, and the negotiator for the United States told the Yankton Sioux that the Lake Traverse Reservation continued to exist after the Sisseton sold their land for a sum certain.[3] While this Court subsequently determined that the Lake Traverse Reservation was disestablished in 1891, the contemporaneous understanding of the Yankton Sioux in 1892 was that the Lake Traverse Reservation continued to exist after the sale, and so the Yankton Sioux would believe that if they sold their surplus land for a sum certain, their reservation would continue to exist.

The State argument to the contrary is not based upon the contemporaneous understanding of the Yankton Sioux. It is based upon a decision by this Court over 80 years after the Yankton Sioux sold their surplus land. The state's attempt to impute this Court's conclusion in *DeCoteau* to the Yankton Sioux in 1892 is contrary to this Court's precedent.

This Court should reject the State's sole argument against the Tribe's petition for a writ of certiorari, and

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[3] Col. Adams stated to the Yankton Sioux "Here is the line of the Sisseton Reservation in my county. I live here, about 15 miles from the line of the Sisseton. Right here lives a friend of mine by the name of Vick, just outside the Reservation line. Just inside of the line of reservation lives an Indian friend of mine named Chunek." Council of the Yankton Indians (Dec. 10, 1892), transcribed in S. Exec. Doc. 27, 53d Cong., 2d Sess., at 72.

should then correct the undisputed error of the Court of Appeals.[4]

II. YANKTON SIOUX REPLY TO RESPONSE OF AMICUS CITIES

The cities of Dante, Geddes, Lake Andes, Pickstown, Platte, Ravinia and Wagner amicus curiae (amicus cities) filed a brief in support of the State's position. Like the State, the cities' brief does not respond to the issue raised in the Tribe's petition for certiorari.

Section IIA of the cities' brief is the only section which purports to respond to an argument of the Yankton Sioux Tribe.[5] The cities' state that, on page five of the Tribe's petition, the Tribe makes certain arguments regarding the 1858 boundaries of the Yankton Sioux Reservation. The cities then argue that the Tribe's argument on page five is inconsistent with other arguments of the Tribe. Cities' Brief at 7, 8. Page five of the Tribe's petition is devoted to a procedural history of the case, and does

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[4] Assuming the Court does not review the determination that the Reservation continued after 1894, the Court could dispose of this manner by summary disposition, reversing the unprecedented Circuit Court's determination that the Reservation continues to diminish after 1894 as general allotments pass to non-Indians. The State has presented no argument which supports the Circuit Court decision, and they would not be able to present such argument if the Court allowed full briefing on the issue.

If the Court were to grant the State's petition for a writ of certiorari, it would then need to also grant the Tribe's petition. Unless the Court were to find the Yankton Sioux Reservation disestablished, it would have to reverse the Court of Appeals determination regarding the effect of allotment.

[5] The cities' brief is divided into sections I, IIA, and IIB. Sections I and IIB are responses to the United States. The tribe will not respond to the cities' conjecture regarding the motives of the United States or the cities' mischaracterization of the position of the United States.

not contain any argument or discussion of the Tribe's position. The cities' argument is based upon fabrication of, and mis-characterization of, the Tribe's argument. Their brief does not make any argument against granting of the Tribe's petition.

III. YANKTON SIOUX REPLY TO UNITED STATES BRIEF IN OPPOSITION TO WRITS OF CERTIORARI

In its brief, the United States makes four major arguments. The Solicitor General argues:

> 1. The Circuit Court correctly held that the Yankton Sioux Reservation has not been disestablished, and that ruling is not in conflict with *DeCoteau* or *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999).
>
> 2. The Circuit Court ruling that the Reservation has not been disestablished is not a matter of sufficient importance for Supreme Court review.
>
> 3. The Circuit Court incorrectly held that the Yankton Sioux Reservation was further diminished (and continues to diminish at present) when Indian allotments passed (and continue to pass) to non-Indian hands after the 1894 congressional action at issue.
>
> 4. The Circuit Court decision that the Reservation had been further diminished after 1894 is not a matter of sufficient importance to merit Supreme Court review.[6]

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[6] The United States also devotes a footnote to its inventive, but obviously incorrect, argument that the Court of Appeals decision is not contrary to 18 U.S.C. § 1151(a). The State of South Dakota and amicus cities did not even support the United States argument on that point.

The Yankton Sioux Tribe agrees that the first three of these arguments are correct, but disagrees with contention four, above. In its petition for a writ of certiorari, the Tribe discussed the importance of this case. The Tribe's response to the United States will demonstrate the error of the U.S. argument that the issue raised by the Tribe is not of sufficient importance to merit Supreme Court review.

In its decision, the Court of Appeals erroneously held that allotments, which it found were Reservation in 1894, ceased to be Reservation after 1894. The disagreement between the United States and the Tribe is whether the clear Court of Appeals error is limited to the 1894 Act at issue, or whether the error applies to allotments under the General Allotment Act of 1887.

If the Court of Appeals error is based upon a misinterpretation of the intent of the General Allotment Act, then this case is of exceptional importance. The case would, in fact, be the most important change in the definition of "Indian Country" in at least the past 100 years. Neither the United States, nor the State of South Dakota, nor the amicus cities, contest the importance of the Court of Appeals decision if that decision is based upon the General Allotment Act.[7]

Based upon its own interests, and its responsibilities to all Indian tribes, the United States seeks a narrow interpretation of the Court of Appeals error, arguing that *Yankton II* is based upon facts unique to the 1894 Act, and not facts generally applicable under the General Allotment Act. Unfortunately for Indian tribes throughout the

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[7] As discussed in the Tribe's petition, pp. 11-14, it is also indisputable that the Circuit Court decision is contrary to this Court's interpretation of the effect of allotment under the General Allotment Act. This Court has repeatedly held that allotments under the General Allotment Act did not cease to be reservation land, notwithstanding the issuance of any patent. *See also* 18 U.S.C. § 1151(a).

United States, that narrow interpretation is not supported by the Court of Appeals decision.[8]

A. Interpretation of the Reservation status of General Allotments is based upon the intent of the General Allotment Act, not based upon intent of the 1894 Act.

Contrary to the position of the United States, this Court, in *Mattz v. Arnett*, 412 U.S. 481 (1973) rejected a fact-specific test to determine whether General Allotments which are part of a reservation cease, at some later point in time, to be reservation. Like the United States in this matter, the respondent in *Mattz v. Arnett* attempted to interpret the effect of allotment based upon negotiation history unique to its case. In rejecting that argument, the Court wrote:

> The respondent relies upon what he feels is significant language in the Act and upon references in the legislative history. . . .
>
> We conclude however, that this is a misreading of the meaning of the effect of the allotment provisions in the 1892 Act. The meaning of those terms is to be ascertained from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388.
>
> . . .
>
> . . . Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotments. The

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[8] It is telling that the State of South Dakota does not follow the lead of the United States and argue the case is of limited importance. The Tribe's petition, pp. 17-19, explained the legally correct argument which states will make based upon *Yankton II*, and the State does not disavow that argument. They do not suggest the case is of limited importance, and they remain poised to take advantage of the important error of the Court of Appeals.

> 1892 Act was but one example of this. Its allotment provisions, which do not differ materially from those of the General Allotment Act of 1887, and which in fact refer to the earlier act, do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation. Rather, allotment under the 1892 Act is completely consistent with continued reservation status.

Id. at 496.

Similar to *Mattz*, the 1894 Act is special legislation enacted to carry out the General Allotment Act. The allotments at issue in the captioned matter were made under the General Allotment Act. In fact, most allotments on the Yankton Sioux Reservation were made prior to the 1892 agreement and the 1894 Act which congressionally approved the 1892 agreement. *Yankton II*, at 1013, n.3; 14 F. Supp. 2d at 1140-41. *Cf. DeCoteau, supra.* (Special legislative act allowed for additional allotments beyond those provided for in General Allotment Act.)

Whether the allotments cease to be Reservation is therefore to be determined by this Court's well-established interpretation of the underlying General Allotment Act, not based upon the unique 1894 Act or the unique negotiation history with the Yankton Sioux Tribe. *Mattz, supra.* As discussed in the Tribe's petition, and not disputed by the United States, this Court's holding has consistently been that allotments continue to be Reservation, notwithstanding the issuance of any patent. *See, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984).

While other areas of the 1894 agreement turn on the specific facts of the 1894 agreement, the effect of allotment is based upon the general principles of General Allotment Act. The Court of Appeals reinterpretation of

the effect of allotment under the General Allotment Act is therefore of enormous significance.[9]

B. *Yankton II* did not determine the effect of allotment based upon facts unique to this case.

In its response, the United States asserts that "the Court of Appeals relied upon provisions of the 1894 Act, 'when read in its full historical context,' that anticipated that tribal members would eventually receive fee title to their allotments." *U.S. Response* at 26. The text of the Court of Appeals decision makes clear that the "full historical context" is the General Allotment Act itself. The Court wrote: "Some articles of the [1894] Act reflect the parties' assumption that an allottee who received full title at the end of the trust period would become subject to the civil and criminal laws of the state or territory in which he resided."

The Court of Appeals also stated:

> "Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist and on the belief that allotting lands and purchasing those left unallotted were steps in the process of eventually dismantling the reservation system."

Yankton II, at 1018.

It was the General Allotment Act which provided for allotment of the Reservation. The 1894 Congress's "assumption" that allotments would eventually be held in fee and subject to state jurisdiction is based upon the

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[9] As the above discussion shows, if the United States were correct that the Court of Appeals determined the effect of allotment on facts unique to the 1894 agreement, that would be contrary to *Mattz*. The argument of the United States therefore does not support denial of a writ of certiorari. It supports certiorari, while interpreting *Yankton II* in a manner other than the Tribe's interpretation. As discussed below, the Tribe's interpretation is the correct interpretation of *Yankton II*.

explicitly statutory provisions of the General Allotment Act, and the assumption was not based upon any fact unique to the 1894 Act. Under the General Allotment Act, Yankton Sioux tribal members received trust patents to land, and the General Allotment Act provided that, after a 25 year trust status, Indians would receive fee patents. The "full historical context" referred to by the Court is not unique to the Yankton Sioux Reservation.[10]

While the United States wishes this case were of limited significance, the allotments at issue were made under the General Allotment Act, and the Court of Appeals decision breaks with prior case law interpreting the effect of General Allotment. This case is therefore of substantial importance, and this Court should grant certiorari on the questions presented by the Yankton Sioux Tribe.

CONCLUSION

The State of South Dakota and the amicus cities do not present any argument against granting the Tribe's petition for a writ of certiorari. Instead, they use their responses to further argue that the State petition should be granted. The United States presents an argument against granting the Tribe's petition, but their argument is based upon an incorrect interpretation of the Court of Appeals decision.

The Court should grant the Tribe's petition for a writ of certiorari.

Respectfully submitted,

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[10] In contrast, when the Court discusses the historical context with regard to whether the Reservation was disestablished (the issue the State asks this Court to review), the detailed Court analysis is based upon facts unique to the Yankton Sioux agreement.